S. HRG. 100-631

NATIONAL TRAILS SYSTEM IMPROVEMENT ACT OF 1987 AND REVISING THE BOUNDARIES OF THE SALEM MARITIME NATIONAL HISTORIC SITE

HEARING

BEFORE THE

SUBCOMMITTEE ON
PUBLIC LANDS, NATIONAL PARKS AND FORESTS

OF THE

COMMITTEE ON
ENERGY AND NATURAL RESOURCES
UNITED STATES SENATE

ONE HUNDREDTH CONGRESS

SECOND SESSION

ON

S. 1544

TO AMEND THE NATIONAL TRAILS SYSTEM ACT TO PROVIDE FOR COOPERATION WITH STATE AND LOCAL GOVERNMENTS FOR THE IMPROVED MANAGEMENT OF CERTAIN FEDERAL LANDS, AND FOR OTHER PURPOSES

H.R. 2652

TO REVISE THE BOUNDARIES OF SALEM MARITIME NATIONAL HISTORIC SITE IN THE COMMONWEALTH OF MASSACHUSETTS, AND FOR OTHER PURPOSES

MARCH 3, 1988

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CONTENTS

Page
S. 1544 3
H.R. 2652 10

STATEMENTS

Burwell, David G., president, Rails-to-Trails Conservancy 85
Byron, Hon. Beverly B., U.S. Representative from Maryland 48
Crandall, Derrick A., president, American Recreation Coalition 76
Henley, Susan A., executive director, American Hiking Society 101
Kennedy, Hon. Edward M., U.S. Senator from Massachusetts 38
Kerry, Hon. John F., U.S. Senator from Massachusetts 39
Krause, Richard L., assistant counsel, American Farm Bureau Federation, Park Ridge, IL 127
McCray, Paul, Northern Virginia Regional Park Authority, Fairfax, VA 67
McKee, Steven M., director, Gorman Nature Center, Mansfield, OH 71
Metzenbaum, Hon. Howard M., U.S. Senator from Ohio 1
Mott, William Penn, Jr., Director, National Park Service, Department of the Interior on:
  S. 1544 12
  H.R. 2652 33
Northrop, Stuart J., chairman, Executive Committee, Huffy Corp., Dayton, OH 81
Robertson, F. Dale, Chief, Forest Service, U.S. Department of Agriculture 43
Welsh, Richard, executive director, National Association of Reversionary Property Owners, Issaquah, WA 109

APPENDIX

Additional material submitted for the record 133

NATIONAL TRAILS SYSTEM IMPROVEMENT ACT OF 1987 AND REVISING THE BOUNDARIES OF THE SALEM MARITIME NATIONAL HISTORIC SITE

THURSDAY, MARCH 3, 1988

U.S. SENATE,
SUBCOMMITTEE ON PUBLIC LANDS,
NATIONAL PARKS AND FORESTS,
COMMITTEE ON ENERGY AND NATURAL RESOURCES,
Washington, DC.

The subcommittee met, pursuant to notice, at 2:12 p.m., in room SD-366, Dirksen Senate Office Building, Hon. Howard M. Metzenbaum, presiding.

OPENING STATEMENT OF HON. HOWARD M. METZENBAUM, U.S. SENATOR FROM OHIO

Senator METZENBAUM. This hearing will come to order.

This might be called a hearing on the quality of life. Nothing exciting about it, but really having so much to do with the ability of people to enjoy themselves on trails, bicycle trails, running trails. It is not a matter that stirs the imagination or gets people all excited and determined that it is a do or die event, not even a matter that brings out strong opposition.

But I am pleased that we have scheduled this hearing today to hear testimony, on a bill I introduced last year, a bill to amend the National Trails System Act to encourage the creation of recreational trails from abandoned railroad corridors.

I greatly appreciate Senator Bumpers' cooperation in arranging this hearing. I did not know the sound system was off, so I guess I had better holler a little bit.

I am sure that we will hear a great deal of testimony this morning from the witnesses about the importance of outdoor recreation in this country. Not until I introduced this bill, however, did I realize how popular trails have become for a number of recreational activities. I have heard from individuals and groups throughout Ohio and in many other States about the need for trails in their area, and their efforts to create trails from abandoned railroad corridors.

In fact, I visited one converted rail-trail last spring which runs between Loveland and Morrow, Ohio, the Little Miami Scenic Trail. I was impressed by the enthusiasm and local pride on the part of those who had created that trail. They are now reaping its rewards. I had a chance to ride a bicycle on part of that trail, and it was an exciting experience.

Americans have always enjoyed the outdoors and will continue to do so. I fear, however, that increasing urbanization and development will continue to encroach upon our remaining outdoor recreation areas. Therefore, it makes sense to try to preserve some of these magnificent railroad corridors before they, too, become subdivided and developed. Once they are gone, they are lost forever.

This bill will help to preserve these corridors without significantly increasing Federal spending. In so doing, it retains valuable property in Federal ownership for the benefit of the American public. In addition, it provides communities and States the tools they need to enhance local recreational opportunities.

I would like to quote from the report prepared by the President's Commission on America's outdoors. "More and more outdoor recreation occurs close to home," they said, "in or near towns and cities where 80 percent of us soon will live. City parks are wearing out. There are fewer sidewalks for a population whose favorite outdoor pastime is walking. We recommend that communities create a network of greenways across the country."

This afternoon we will hear from two who served on that commission.

I appreciate the cooperation of all those who have agreed to testify today, especially those who have traveled here from Ohio. I am also very pleased to welcome Representative Beverly Byron who has sponsored this legislation in the House.

I would like to note for the record that several specific railroad companies, as well as the American Association of Railroads, were invited to testify at this hearing. They all declined, generally saying they took no position on S. 1544. Also, although no State officials are here to testify, I have here a letter from the Director of the Ohio Department of Transportation. He lists 11 Ohio rail-trail projects which would benefit from the bill. He states, and I quote, "Such a bill would be a significant aid in securing abandoned railroad right-of-way for trails in the State of Ohio. These projects will require a great deal of time, money and effort in order to buy them from the railroads or from adjacent property owners. This list of 11 projects," still in quotes, "is probably just the beginning of a very important transportation, recreation and economic asset to these communities. All support that you can give to the passage of a bill favorable to the bicycle and other trail users will be appreciated."

Is the Honorable Beverly B. Byron here? I guess not.

[The texts of S. 1544 and H.R. 2652 follow:]

II

100TH CONGRESS
1ST SESSION

S. 1544

To amend the National Trails System Act to provide for cooperation with State and local governments for the improved management of certain Federal lands, and for other purposes.

IN THE SENATE OF THE UNITED STATES

JULY 24 (legislative day, JUNE 23), 1987

Mr. METZENBAUM (for himself, Mr. BINGAMAN, Mr. FOWLER, Mr. LEVIN, and Mr. JOHNSTON) introduced the following bill; which was read twice and referred to the Committee on Energy and Natural Resources

---

A BILL

To amend the National Trails System Act to provide for cooperation with State and local governments for the improved management of certain Federal lands, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "National Trails System Improvements Act of 1987".

SEC. 2. FINDINGS.

Congress hereby finds that—

(1) State and local governments have a special role to play under the National Trails System Act in acquiring and developing trails for recreation and conservation purposes;

(2) State and local government initiatives are frequently rendered more difficult because of a lack of sources of readily available funding, especially for trail acquisition;

(3) a self-financed fund would facilitate State and local efforts to acquire and develop trails in accordance with the National Trails System Act; and

(4) such a fund should be created and efficiently administered to provide a source of funds on a timely basis for acquisition and development of appropriate trails.

SEC. 3. NATIONAL TRAILS SYSTEM ACT AMENDMENTS.

Section 9 of the National Trails System Act (16 U.S.C. 1248) is hereby amended by adding the following new subsections after existing subsection (b):

"(c) Commencing upon the date of enactment of this subsection, the right, title, interest, and estate of the United States in all rights of way of the type described in the Act of March 8, 1922 (43 U.S.C. 912), shall remain in the United States upon the abandonment or forfeiture of such rights of way, or portions thereof, except to the extent that any such right of way, or portion thereof, is embraced within a public highway no later than one year after a determination of abandonment or forfeiture, as provided under such Act.

"(d)(1) All rights of way, or portions thereof, retained by the United States pursuant to subsection (c) which are located within the boundaries of a conservation system unit or a National Forest shall be added to and incorporated within such unit or National Forest and managed accordingly.

"(2) All such retained rights of way, or portions thereof, which are located outside the boundaries of a conservation system unit or a National Forest but adjacent to or contiguous with any portion of the public lands shall be managed pursuant to the Federal Land Policy and Management Act of 1976 and other applicable law, including this section.

"(3) All such retained rights of way, or portions thereof, which are located outside the boundaries of a conservation system unit or National Forest which the Secretary of the Interior determines suitable for use as a public recreational trail or other recreational purposes shall be managed by the Secretary for such uses, unless the Secretary determines that it is appropriate to dispose of such lands pursuant to subsection (e) of this section.

"(e)(1) Upon application by a unit of State or local government or by another entity which the Secretary of the Interior determines to be legally and financially qualified to manage a portion of such retained rights of way for public recreational purposes, the Secretary of the Interior is authorized to transfer to such unit or entity the right, title, and interest of the United States in the surface estate of such portion which is located outside the boundary of a conservation system unit or National Forest, on the condition that should such unit or entity attempt to sell, convey, or otherwise transfer such right, title, or interest or attempt to permit the use of any part of such transferred portion of such retained rights of way for any purpose other than public recreation, then all right, title, and interest transferred by the Secretary pursuant to this subsection shall revert to the United States.

"(2) The Secretary is authorized to sell any portion of such retained rights of way which is located outside the boundaries of a conservation system unit or National Forest if such portion is—

"(A) not adjacent to or contiguous with any portion of the public lands; or

"(B) determined by the Secretary, pursuant to the disposal criteria established by section 203 of the Federal Land Policy and Management Act of 1976, to be suitable for sale.

Prior to conducting any such sale, the Secretary shall take appropriate steps to afford a unit of State or local government or any other entity an opportunity to seek to obtain such lands pursuant to paragraph (1) of this subsection.

"(3) All proceeds from sales of such retained rights of way shall be deposited into the Treasury of the United States and credited to the Trails Fund.

"(f) As used in this section—

"(1) the term 'conservation system unit' has the same meaning given such term in the Alaska National Interest Lands Conservation Act (Public Law 96–487; 94 Stat. 2371 et seq.), except that such term shall also include units outside Alaska~~;~~ and

"(2) the term 'public lands' has the same meaning given such term in the Federal Land Policy and Management Act of 1976.".

SEC. 4. TRAILS FUND.

(a) ESTABLISHMENT.—There is hereby established within the Treasury of the United States a separate revolving trails development fund to be known as the Trails Fund. The Trails Fund shall consist of any appropriation made by the Congress, any income from the proceeds of dispositions under section 9(e) of the National Trails System Act, any income or interest received under this section, donations designated for the Trails Fund, and all interest on investments. If the Secretary of the Interior determines that the Trails Fund contains, at any time, amounts in excess of current needs, the Secretary of the Interior may request the Secretary of the Treasury to invest such amounts, or any portions of such amounts, in obligations of the United States having maturities determined by the Secretary of the Treasury to be appropriate to the needs of the Trails Fund and bearing interest at rates determined to be appropriate by the Secretary of the Treasury.

(b) UTILIZATION OF FUNDS.—(1) The Secretary of the Interior is authorized to utilize available monies from the Trail Fund for the acquisition of new trails or, in appropriate instances, involving the construction or reconstruction of existing trails for public use, to make loans to State or local agencies, qualified private organizations, or appropriate Federal agencies.

(2) At least 60 percent of such funds available in any fiscal year under paragraph (1) shall be made available for loans to State or local agencies or qualified private organizations. At least 60 percent of such funds in each fiscal year shall be devoted to the acquisition of new trails.

(3) The Secretary of the Interior shall determine whether or not to charge interest on funds made available pursuant to this section and may establish the rate of interest (if any) to be charged.

(4) Loans from the fund shall generally be repaid within four years of the date of the loan.

(c) Regulations and Cooperation.—(1) The Secretary of the Interior shall promulgate regulations to implement section 9 of the National Trails System Act (as amended by this Act) and to implement this section. Such regulations shall, among other things, provide a mechanism to make funds available for acquisition of rights of way for public trails and interim trail purposes within the time periods provided in applicable regulations or orders issued under otherwise applicable authorities.

(2) All agencies of the United States shall cooperate with the Secretary of the Interior in implementing this section.

(d) Report.—The Secretary of the Interior, in conjunction with the Secretary of the Treasury, shall report annually to the Committee on Interior and Insular Affairs of the House of Representatives and the Committee on Energy and Natural Resources of the Senate concerning the financial condition and operations of the Trails Fund.

(e) Authorization of Appropriations.—There is hereby authorized to be appropriated $200,000 each year in fiscal years 1988, 1989, 1990, 1991, and 1992 for the administration of this Act. There is hereby authorized to be appropriated $500,000 each year in fiscal years 1988 and 1989 for the Trails Fund.

II

100TH CONGRESS
1ST SESSION

H. R. 2652

IN THE SENATE OF THE UNITED STATES

OCTOBER 6 (legislative day, SEPTEMBER 25), 1987

Received; read twice and referred to the Committee on Energy and Natural Resources

---

AN ACT

To revise the boundaries of Salem Maritime National Historic Site in the Commonwealth of Massachusetts, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. BOUNDARY REVISION OF SALEM MARITIME NATIONAL HISTORIC SITE.

(a) BOUNDARY REVISION.—The Salem Maritime National Historic Site (hereafter in this Act referred to as the "national historic site"), designated on March 17, 1938, under section 2 of the Act of August 21, 1935 (49 Stat. 666), and located in Salem, Massachusetts, shall consist of lands and interests in lands as generally depicted on the map entitled "Boundary Map, Salem Maritime National Historic Site, Salem, Massachusetts", numbered 373–80,011, and dated April 1987. The map shall be on file and available for public inspection in the offices of the National Park Service, Department of the Interior.

(b) ACQUISITION OF LANDS.—The Secretary of the Interior may acquire lands or interests therein within the boundary of the national historic site by donation, purchase with donated or appropriated funds, or exchange. Any lands or interests in lands owned by the Commonwealth of Massachusetts or any political subdivision thereof may be acquired only by donation. Lands and interests therein acquired pursuant to this Act shall become part of the national historic site and shall be subject to all the laws and regulations applicable to the national historic site.

Passed the House of Representatives October 5, 1987.

Attest: DONNALD K. ANDERSON,

Clerk.

Senator METZENBAUM. William Penn Mott, Director of the National Park Service, we are very happy to hear from you, sir.

STATEMENT OF WILLIAM PENN MOTT, JR., DIRECTOR, NATIONAL PARK SERVICE, DEPARTMENT OF THE INTERIOR

Mr. MOTT. Mr. Chairman, I filed my complete statement with you, and I would like to just summarize, in the interest of time, our position on this particular bill.

Mr. Chairman, we believe that trails and trail-related activities represent excellent outdoor recreation opportunities for American citizens. The railroad rights-of-way represent potentially one of the best opportunities to establish new trails that wind through urban and suburban communities and traverse scenic open space, as well. We support the intent of the bill to encourage State and local governments to acquire and develop trails for recreation and conservation purposes, but we cannot recommend enactment of the bill in its present form. It would be premature for us to support such a measure without a comprehensive understanding of all of the legal issues involved, and there are many which would be unresolved under S. 1544.

Moreover, we do not agree with the findings of the bill outlining a strong Federal role in providing funding. Congress has, in Section 8(d) of the National Trails System Act, sought to encourage the railroads to make their inactive rights-of-way available for trail use on an interim basis. Under that arrangement, the public gets the use of the trails and the railroads keep the right-of-way for reconversion to railroad use at a later date.

S. 1544 represents another way to implement the rails-to-trails policy. It applies to rights-of-way granted to the railroads by the Federal Government. When such a right-of-way is abandoned, S. 1544 provides that whatever residual property rights the Federal Government retains will be reserved for possible trail use.

Mr. Chairman, we believe the intent of the bill is sound public policy. The Federal Government granted these rights and, if possible, should be able to determine how they are used if they are abandoned. However, the Solicitor's Office of the Department has indicated that the Federal Government may not have any residual rights at all after the right-of-way is abandoned. Apparently courts have called into question the extent of the Federal Government's residual rights. I have been assured that our Solicitor's Office will develop suggested amendments to S. 1544 that will address this issue, and we will get those amendments to the staff very shortly.

As my prepared statement says, Mr. Chairman, we wish to support this bill because we strongly believe in its goals. We hope to have technical amendments to your committee staff shortly.

That concludes my remarks. I would be glad to answer any questions.

[The prepared statement of Mr. Mott on S. 1544 follows:]

STATEMENT OF WILLIAM PENN MOTT, JR., DIRECTOR, NATIONAL PARK SERVICE, DEPARTMENT OF THE INTERIOR, BEFORE THE SUBCOMMITTEE ON PUBLIC LANDS, NATIONAL PARKS AND FORESTS, SENATE COMMITTEE ON ENERGY AND NATURAL RESOURCES, CONCERNING S. 1544, THE PROPOSED NATIONAL TRAILS SYSTEM IMPROVEMENTS ACT OF 1987.

MARCH 3, 1988

Mr. Chairman, I appreciate the opportunity to provide your Subcommittee with the views of the Department of the Interior on S. 1544, the proposed National Trails System Improvements Act of 1987.

We support the intent of the bill, to encourage State and local governments to acquire and develop trails for recreation and conservation purposes, but we cannot recommend enactment of the bill in its present form. It would be premature for us to support such a measure without a comprehensive understanding of all the legal issues involved, and there are many which would be unresolved under S. 1544. Moreover, we do not agree with the findings of the bill outlining a strong Federal role in providing funding.

S. 1544 would amend the National Trails System Act by adding four subsections to section 9. These provisions deal with abandoned or forfeited railroad rights-of-way. Under existing law, if it reverts to the U.S., an abandoned or forfeited right-of-way is conveyed to the owner of the land traversed by the right-of-way or to a city if the right-of-way is within a municipality. Under S. 1544, whatever right-of-way interest that may revert to the U.S. would remain in the Federal Government to be managed or disposed of as follows:

-- If the right-of-way is within the National Park System, National Wildlife Refuge System, National Trails System, National Forest System, or Wild and Scenic Rivers System, it becomes part of that system and is managed accordingly.

- -- If the right-of-way is not within one of the conservation systems but is nevertheless adjacent to public lands managed by the Bureau of Land Management, then it shall be managed by BLM in accordance with FLPMA.

- -- If the right-of-way is outside of a conservation system unit, it could be transferred to qualified non-Federal entities for recreational purposes, or, if not adjacent to BLM lands, sold with the proceeds deposited into a new fund in the Treasury, the Trails Fund.

We note that other federally-managed areas such as Bureau of Reclamation withdrawals, military reservations, and Indian lands held in trust by the United States are not covered by the legislation.

Section 4 of the bill would establish the Trails Fund, to consist of initial appropriations of $500,000 in fiscal years 1988 and 1989, together with proceeds from right-of-way sales, donations, and interest. The fund would be available, without appropriation, for acquisition and construction of trails and for loans to states, local governments, and qualified private organizations. The loans may be interest-free.

The bill further requires an annual report to the legislative Committees of Congress, and it authorizes appropriations totalling $1 million over 2 years for the Trails Fund.

Mr. Chairman, we believe that trails and trail-related activities represent excellent outdoor recreation opportunities for America's citizens. Accordingly, we support the initial finding of the bill related to encouraging State and local governments to establish additional trail opportunities, as well as the intent of the provision of the bill that would effectively repeal 43 U.S.C. 912. Apparently, the intent of this last provision is to ensure that any Federal interests in abandoned railroad rights-of-way would remain in Federal ownership unless and until a conscious decision is made to transfer or sell such interests for recreational use. We estimate that approximately 30,000 miles of public land rights-of-way were granted to the railroads in the 1800's, and we share the belief of the bill's sponsors that much of this mileage could be converted to trail use at such time as it may be abandoned.

There are, however, several problems with the bill that make it seriously flawed.

We have no specific data, for example, on what rights-of-way might become available or even how much has been abandoned. We believe that further analyses and surveys would determine the dimension of the opportunities or liabilities such rights-of-way represent. Such surveys should be required before we can undertake to support S. 1544, and they would require close coordination with other Federal interests, State and local governments, and private property owners, including the railroads themselves. We would also encourage private groups to assemble data on candidate areas.

In addition, and more seriously, there are several outstanding legal issues related to the proposed assertion by the Federal Government to reclaim title to some of these rights-of-way. Although we are certainly willing to release whatever interest the Federal Government may have, if any, in the surface rights to such property for the purposes envisioned by S. 1544, it is unclear what these rights may be. Our Departmental Solicitor's office has been studying this question, and the results appear to be mixed.

In some jurisdictions, the right-of-way has been construed as creating a type of limited fee title for the property owner, thus leaving some interest in the original grantor (the Federal Government), and adjacent property owners could not expect that they would have ownership rights to the abandoned right-of-way. In other jurisdictions, however, it has been determined that the right-of-way is simply an easement over land owned by the underlying property owner. In these cases, the Federal Government retains no right to assert title to the property unless it is on Federal land. The right-of-way would no longer exist, and the underlying property owner would no longer carry this burden on his property. Therefore, upon abandonment, such property would normally revert to that property owner. Many adjacent property owners evidently have past assurances from the Federal Government that the right-of-way is just an easement, and the property belongs to them. The 1922 Act is vague in this regard.

If S. 1544 were enacted, we are concerned, therefore, that the Federal Government could be placed in the position of asserting title to that which it no longer owns, thus creating an issue of a potential taking by the Federal Government of private property. We see the possibility of numerous law suits over this very matter, and that is one reason we believe these determinations are best left to State and local governments to resolve. Moreover, we believe that the State and local governments would be in a far better position than we are to negotiate for such recreational use.

We therefore recommend that section 3 of the bill be drawn to amend the Act of May 8, 1922, 43 U.S.C. 912, rather than section 9 of the National Trails System Act. Also, by separate letter, we would like to offer several other technical amendments to the bill, especially section 3, to address the problems that were raised during our review of the measure. We question, for example, the need for additional authority to transfer or sell any Federal property interests that may exist.

We believe that Congress should also consider the liability issue, not treated in S. 1544, if Federal rights-of-way are conveyed to a state or other entity subject to a reversionary clause. Under section 8(d) of the Trails Act, which deals with interim use of rights-of-way for trails, the transferee must assume all tort liability. A similar provision should be considered for transfer of Federal interests. Consideration could also be given to requiring a railroad to remove hazards, including toxic wastes, following a decision to abandon. This would also provide assurance that hazardous products and materials would not automatically be included in a federally-managed area, with consequent financial exposure, under the terms of the bill.

Finally, Mr. Chairman, we oppose a new Federal loan program which would require increased appropriations and would earmark receipts from Federal property sales to the new Trails Fund to be created under the bill. This would undercut the ability of the Congress and the Administration to make rational resource allocations from the amounts available to them. Moreover, this would disconnect the need for funding state and local trail programs, an activity which is not a Federal responsibility, from the level of funding provided. We also note that the previously cited question of ownership could also call into question a source of Trail Fund monies, since the Federal Government cannot sell that which it does not own.

In summary, Mr. Chairman, we have tried to find a way to support this bill because we strongly believe in its goals, but without a resolution of these underlying legal questions and as long as the proposal for Federal funding remains, we cannot support S. 1544.

This concludes my prepared testimony, Mr. Chairman. I would be pleased to respond to any questions you may have.

Senator **Metzenbaum**. Thank you very much, Mr. Mott. We are happy to have your support, and will appreciate any suggestions that your Solicitor may have or that you may have.

In your testimony you expressed reservations concerning what property interest the United States has retained in these federally granted railroad rights-of-way. You also intimated that we should do nothing until that issue is resolved.

What concerns me is that each year this committee is called upon to pass legislation releasing the Federal interest in these rights-of-way. In the last Congress we passed several bills to clarify title and release the Federal interest in railroad rights-of-way. That is how, frankly, I became interested in this situation in the first place.

How would you suggest that we resolve that issue?

Mr. **Mott**. My suggestion, Mr. Chairman, is that if you have some questions with regard to this legal issue, which is complicated, as I understand it, that you address a letter to the Solicitor's office and ask them for clarification of their reasons relative to this particular subject.

Senator **Metzenbaum**. Is it my understanding that the Solicitor is coming forward with some suggested amendments to the bill?

Mr. **Mott**. Yes, that is my understanding. I understand that you have written a letter to the Solicitor's office asking some detailed questions, and that they are prepared to answer those and may have the answers to you either today or tomorrow.

Senator **Metzenbaum**. So they will be forthcoming shortly.

Mr. **Mott**. That is correct.

Senator **Metzenbaum**. I am advised by staff that we received those just today, as a matter of fact.

[The letters follow:]

HOWARD M. METZENBAUM, OHIO, CHAIRMAN

BILL BRADLEY, NEW JERSEY
JEFF BINGAMAN, NEW MEXICO
WYCHE FOWLER, JR., GEORGIA

DON NICKLES, OKLAHOMA
LOWELL P. WEICKER, JR., CONNECTICUT
DANIEL J. EVANS, WASHINGTON

United States Senate

SUBCOMMITTEE ON
ENERGY REGULATION AND CONSERVATION
COMMITTEE ON
ENERGY AND NATURAL RESOURCES
WASHINGTON, DC 20510

February 19, 1988

Mr. Robert F. Burford
Director
Bureau of Land Management
Department of Interior
18th and C Streets, NW
Washington, D.C. 20240

Dear Mr. Burford:

The Senate Subcommittee on Public Lands, National Parks and Forests, of the Committee on Energy and Natural Resources, will hold a hearing on March 3, 1988, on S. 1544, legislation which I have introduced to amend the National Trails System Act. Specifically, the bill retains a federal interest in certain federally granted railroad rights-of-way for conversion to recreational trails.

In anticipation of that hearing, I am requesting that you answer the following questions in order to clarify your position on federally granted rights-of-way. To the extent that a specific reference is required with respect to proposed changes in regulation of the rights-of-way, you should focus on the kinds of regulation embodied in the pending legislation, S. 1544, a copy of which I have enclosed.

1. Does the U.S. own a fee interest in abandoned pre-1871 rights-of-way notwithstanding a patent to an adjacent landowner subsequent to the right-of-way grant?

2. What is the nature of the U.S. interest in right-of-way under the 1875 Railway Act prior to abandonment (e.g., to minerals, to control the width of the right-of-way and the use of the right-of-way)? Does the United States retain any interest upon abandonment which is marketable? Do 43 U.S.C. 912 & 913 apply to 1875 Act rights-of-way?

3. Prior to abandonment, can Congress lawfully adopt legislation affecting the scope of its interest in an 1875 Railway Act right-of-way to extend the scope of that interest after abandonment? Put another way, what is the scope of congressional regulation of an 1875 Railway Act right-of-way easement?

4. Is the interest of the U.S. in right-of-way under the 1875 Act sufficiently broad to encompass allowing a public highway to be located in the right-of-way before abandonment or within one year of a declaration of abandonment as provided in 43 U.S.C. 912 & 913?

5. If so, is the term "public highway" currently broad enough to encompass public transportation as would occur on a public recreationnal trail?

6. Whether or not so, can Congress prior to abandonment provide that the right-of-way shall be deemed continued so long as transferred for public recreational trail use, and so long as devoted to such use, without obligation to purchase any interest from the railroad or the subsequent patentee?

I apologize for the late notice, but I would appreciate your responses to these questions by March 1, if possible. Please contact my assistant, Beverly Anthony (224-2315), if this poses a problem. Thank you for your cooperation.

Very sincerely yours,

Howard M. Metzenbaum
United States Senator

HMM/ba

cc: Mr. Tom Sansonnetti, Associate Solicitor

United States Department of the Interior

OFFICE OF THE SOLICITOR
WASHINGTON, D.C. 20240

MAR -3 1988 MAR 0 3 RECD

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The Honorable Howard M. Metzenbaum
Chairman, U.S. Senate Subcommittee
on Energy Regulation and Conservation
Committee on Energy and Natural Resources
Washington, D.C. 20510

Re: S.1544, A Bill to Amend the National Trails System Act

Dear Mr. Chairman:

I have been asked to respond to your letter of February 19, 1988, to Mr. Robert Burford on the above matter. After a rapid but thorough review of your questions and the related law, we offer the following by way of response to the enumerated questions in your letter.

1. The answer to your first question is no. In State of Wyoming v. Udall, 379 F.2d 635, 639 (10th Cir. 1967), the court observed:

> The Act of March 8, 1922 . . . 43 U.S.C. § 912 relates to abandoned railroad rights-of-way and provides that upon abandonment title goes to the owners of the adjoining tract without further conveyance provided that "the transfer of such lands shall be subject to and contain reservations in favor of the United States of all oil, gas, and other minerals."

The Act of March 8, 1922, applies only to the public lands. When the 1922 Act was enacted, no distinction was made between pre-1871 and post-1871 railroad right-of-way grants. Under the then-prevailing Supreme Court law, all of these grants were viewed as "limited fee" grants. But, in 1942, the Supreme Court altered its stance. In Great Northern Railroad Co. v. United States, 315 U.S. 262, 277-279, the court said that a right-of-way granted under the General Railroad Right-of-Way Act of 1875 was an "easement" and not a fee grant. This threw the 1922 Act out of kilter, as easements were thought to terminate upon abandonment. Therefore, the United States would receive nothing under the 1922 Act:

> We realize that in Great Northern the Court completely disregarded the Abandoned Railroad Right-of-Way Act and that after Great Northern such act applied only to pre-1871 grants.

State of Wyoming, supra, 639.

With this concern in mind, more recent decisions have narrowed the gap between the "limited fee," pre-1871 grants and the "easement" or post-1871 grants, so that arguably no real distinction remains. The difficulty is that in narrowing the gap, the precise nature of the railroad's interest in even the pre-1871 grants is no longer clear. Is the interest a fee (title) interest, or is it merely an evaporative easement?

Because of this uncertainty, we believe it would be advisable to view the 1922 Act as providing for a release of whatever interest the Government may hold, and not an affirmative grant, to be sure that the statute would not operate as a "taking" of private property.

2. The United States owns the minerals underlying rights-of-way granted under the 1875 Railroad Right-of-Way Granting Act. Great Northern Railway Co., supra, 279. The United States cannot alter substantively what it has granted, but by means of a 1920 statute, it has purported to authorize railroads to convey portions of their rights-of-way for public highways or street purposes. 43 U.S.C. § 913. See also 23 U.S.C. § 316; State of Idaho v. Oregon Short Line Railroad Co., 617 F. Supp. 219 (D. Idaho 1985). The trend of the more recent decisions is to recognize that the railroad enjoys exclusive possession of the right-of-way but is restricted in its use to only railroad purposes. So long as the railroad's limited use and exclusive possession to that end is not disturbed, other uses may be made of the lands traversed by the right-of-way, if authorized by those whose interests or rights would be affected by the prospective use. See e.g., Energy Transportation Systems Inc. v. Union Pacific Railroad Co., 606 F.2d 934 (10th Cir. 1979); Energy Transportation Systems Inc. v. Union Pacific Railroad Co., 619 F.2d 696 (8th Cir. 1980); Energy Transportation Systems Inc. v. Union Pacific Railroad Co., 435 F.Supp. 313, 318 (D. Wyo. 1977). These cases are concerned with pre-1871 right-of-way grants, but the same principle applies to the right-of-way easements granted under the 1875 Act. Great Northern Railway Co., supra.

As noted above, the Supreme Court has vacillated as to the nature of the right-of-way grants made under the 1875 Railroad Right-of-Way Act. And, as pointed out, today there is a judicial tendency favoring the concept that really no distinction exists between pre-1871 and post-1871 rights-of-way, the theory being that railroad rights-of-way are unique in the sense that railroad operations require exclusive possession of the rights-of-way lands albeit for a limited right of use. If these rights-of-way are viewed as merely "easements," in the conventional sense of that term, the right-of-way ceases to exist upon abandonment and, therefore, nothing reverts to the Government. City of Aberdeen v. Chicago & North Western Transportation Co., 602 F. Supp. 589, 593 (D.S.D. 1984). If, on the other hand, the hybrid interpretation (exclusive possession -- limited use) is followed, a "retained interest" in the United States is found, for purposes of the 1922 Act, 43 U.S.C. § 912. State of Idaho v. Oregon Short Line Railroad Co., Civ. No. 83-1473 (D. Idaho 1985), not reported, but referenced at 617 F. Supp. 213 (D. Idaho 1985).

3. In response to this question we would first note that Congress cannot take away vested property rights without payment of just compensation. Similarly, the United States can resort to the courts to enforce the terms of a federal right-of-way grant.

4. See the answer to question No. 2 above. If, before abandonment, the highway would interfere with a railroad's right of exclusive possession, the United States cannot interfere without the railroad's consent. See 43 U.S.C. § 913, 23 U.S.C. 316. Whether a highway can be located within one year after abandonment, pursuant to 43 U.S.C. § 912, depends on whether the United States is held to have a "retained interest."

5. The expression "public highway" in this question presumably refers to the same expression as found in the 1922 Act, 43 U.S.C. § 912. An examination of the legislative history would be necessary to determine what Congress intended when it used this term in the 1922 Act. In State of Idaho v. Oregon Short Line Railroad Co., supra (not reported), the court said:

> With the relatively recent advent of the automobile, the 66th and 67th Congress obviously perceived the rising importance of highway transportation; and acted to preserve, where possible, railroad rights-of-way for such use. For primarily that purpose, §§ 912, 913 and 316 were enacted.

Presumably, the greater (automotive) use would embrace the lesser (non-automotive) use. Both uses, of course, can include recreational activities.

6. I understand this question to contemplate post abandonment recreational trail use. At the present time, we cannot foresee how a given court might construe the right-of-way interest as a retained interest or an easement. If the "retained interest" interpretation of 43 U.S.C. § 912 prevails in court, then Congress could amend that statute prospectively to provide for recreational trail use of the "retained interest" under such conditions and on such terms as it deems appropriate. The same

observation applies if the statute were construed to operate as a release of whatever interest the government might have. If, in contrast, a court should construe the right-of-way as simply a common law easement, no interest in the land would revert to the United States.

Given the short amount of time we have had to research this matter, we would be happy to cooperate in answering any further questions that you may have.

L. Poe Leggette

for Acting Thomas L. Sansonetti
Associate Solicitor
Energy and Resources

United States Department of the Interior

OFFICE OF THE SOLICITOR
WASHINGTON, D.C. 20240

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MAR 3 1988

The Honorable Howard M. Metzenbaum
Chairman, U.S. Senate Subcommittee
on Energy Regulation and Conservation
Committee on Energy and Natural Resources
Washington, D.C. 20510

Re: S.1544, A Bill to Amend the National Trails System Act

Dear Mr. Chairman:

On page 3 of our letter to you dated today, State of Idaho v. Oregon Short Line Railroad Co., Civ. No. 83-1473 (D. Idaho 1985), was referred to without a reporter citation. In fact the decision was reported. The correct citation is 617 F. Supp. 207 (D. Idaho 1985).

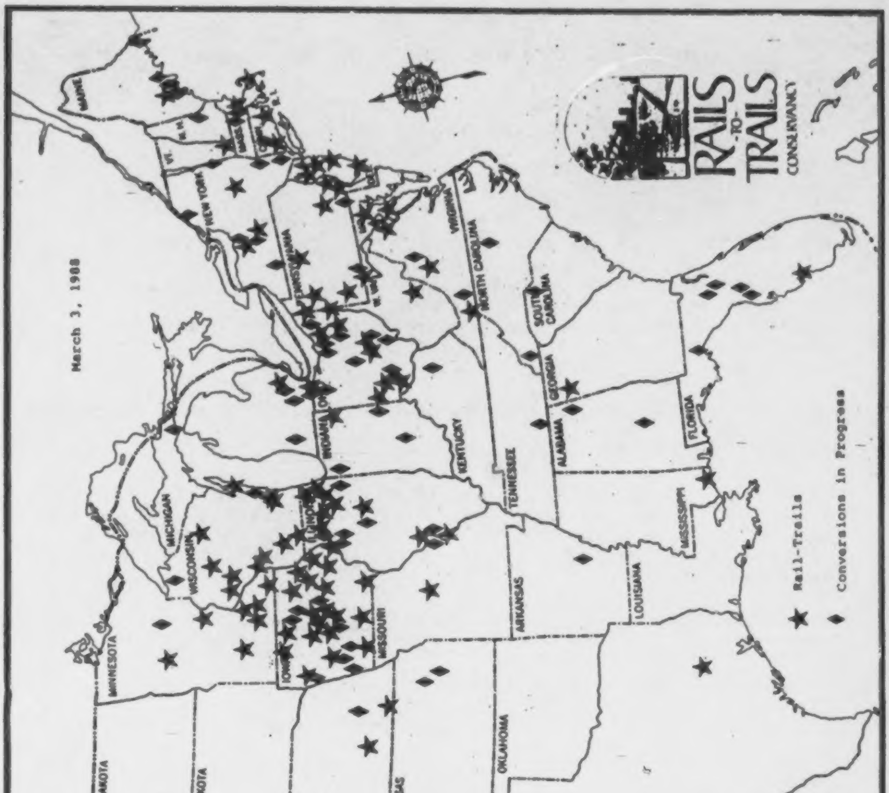
Near the bottom of page 3 there is a quotation taken from this decision. The quoted language appears at 617 F. Supp. 212-213.

We apologize for this oversight.

Sincerely,

L. Poe Leggette

for Thomas L. Sansonetti
Associate Solicitor
Energy and Resources


March 3, 1988
RAILS-TO-TRAILS CONSERVANCY
MAINE
VT.
N.H.
MASS.
NEW YORK
PENNSYLVANIA
W. VA.
VIRGINIA
NORTH CAROLINA
SOUTH CAROLINA
GEORGIA
FLORIDA
ALABAMA
MISSISSIPPI
TENNESSEE
KENTUCKY
OHIO
INDIANA
ILLINOIS
MICHIGAN
WISCONSIN
MINNESOTA
IOWA
MISSOURI
ARKANSAS
LOUISIANA
NORTH DAKOTA
SOUTH DAKOTA
NEBRASKA
KANSAS
OKLAHOMA
TEXAS
MONTANA
WYOMING
COLORADO
NEW MEXICO
IDAHO
UTAH
ARIZONA
WASHINGTON
OREGON
NEVADA
CALIFORNIA
ALASKA
HAWAII
★ Rail-Trails
◆ Conversions in Progress

Senator METZENBAUM. It is my understanding that the written testimony of a couple of the witnesses today claims that the 1922 act currently codified at 43 U.S.C. 912 forever prospectively vests the Federal right-of-way and adjacent property owners, and that Congress cannot change this giveway for a not-yet-abandoned right-of-way without taking the property from adjacent land owners.

I am not sure that this is not a legal question, but maybe you have the answer.

Does the Interior Department believe that these Federal properties have been permanently given away and that Congress cannot retain for the Federal Government those properties where rail use has not been abandoned as S. 1544 does?

Mr. MOTT. Mr. Chairman, I think that is probably again one of these complicated legal questions. My understanding is that in the original 13 States the problem is different than it is in the rest of the States of the Union, and that the rights or the easements or properties that were made available to the railroads prior to 1871 are different there than they are after 1871. I think those are questions that probably the attorneys should answer rather than my trying to answer them.

Senator METZENBAUM. Mr. Mott, it is my understanding the National Park Service has expressed interest in acquiring the D.C. portion of the so-called Georgetown Branch of the Baltimore & Ohio right-of-way which is being abandoned right here in the District of Columbia, but the Park Service lacks the funds to do so.

I realize this bill will not be up and running in time to help, but would S. 1544 be helpful in such situations in the future?

Mr. MOTT. In the case of abandoned public land rights-of-way, I would think so, once we clarify this legal question. This particular trail that you are referring to in Georgetown is a very worthwhile project. I would hope that funding would be available so that project and that right-of-way could go forward because it will make it possible for the people in this area to have a 25-mile hiking trail. I have hiked over a great portion of this area, and I think that it is a very important area to acquire.

Senator METZENBAUM. As I understand, the National Park Service actually does favor the creation of more trails and greenways.

Mr. MOTT. Yes, absolutely.

Senator METZENBAUM. And I gather that you feel that the Interior Department agrees that this bill is consistent with the recommendation of the President's Commission on Americans Outdoors.

Mr. MOTT. That is correct. I think the only question we have is getting squared away on this legal matter.

Senator METZENBAUM. I understand the ICC has at times been uncooperative in helping to negotiate right-of-way sales between railroads and public entities. The ICC is supposed to ensure these sales are made on reasonable terms.

My bill does not address this problem, but can you briefly explain how the ICC regulations are inhibiting rail acquisitions for public use?

Mr. MOTT. I am not sure that I can answer that question. I would prefer to give you a written answer to that, but it is my general understanding that ICC does not normally think in terms of reasonable values. In other words, the values are placed on the trail in segmented parcels based on adjacent property owner values rather than on the total right-of-way.

[Information not received.]

Senator METZENBAUM. I realize you may not have the information today, but could your staff supply for the record in the next two weeks the number of successful conversions to public trail use of railroad rights-of-way which occurred each year over the past few years as well as the number of rail abandonments approved by the ICC each year?

Mr. MOTT. Yes, we will be glad to provide that for you.

[Information not received.]

Senator METZENBAUM. And can you supply it both in miles and in number of instances?

Mr. MOTT. Yes, I will.

Senator METZENBAUM. Could you also supply for the record any reports describing the past, present or future rail-trail program of the National Park Service or its predecessors?

Mr. MOTT. Yes, I will be glad to do that.

[Information not received.]

Senator METZENBAUM. Could you supply for the record any reports dealing with the effect of rail-trails on adjacent property values and crime rates?

Mr. MOTT. Yes. I will be glad to do that.

[Information not received.]

Mr. MOTT. I can tell you of an instance, for example, that I was involved in California with the conversion of the Northern Pacific right-of-way. The people in Miranda, California, were very much opposed to that being a trail on the basis that this was going to create problems of vandalism and deteriorate their property values.

That program went forward, and not only did it increase property values in the area, there were no vandalism incidents that I know of in the last 5 years, and a lot of the children of the families who were opposed to this right-of-way now are selling lemonade in the summertime along the trail.

Senator METZENBAUM. Sounds good to me.

I understand that your testimony, written testimony, indicated some concern with possible amendments to address questions of liability. I gather you and your staff would be willing to work with us to come up with appropriate amendments which are not administratively onerous for anyone, is that correct?

Mr. MOTT. Absolutely.

Senator METZENBAUM. I thank you for your testimony and your responses this afternoon, and we look forward to working with you, Mr. Mott.

[Subsequent to the hearing the subcommittee received the following:]

STATEMENT OF WILLIAM PENN MOTT, JR., DIRECTOR, NATIONAL PARK SERVICE, DEPARTMENT OF THE INTERIOR, BEFORE THE SUBCOMMITTEE ON PUBLIC LANDS, NATIONAL PARKS AND FORESTS OF THE SENATE COMMITTEE ON ENERGY AND NATURAL RESOURCES CONCERNING H.R. 2652, A BILL TO REVISE THE BOUNDARIES OF SALEM MARITIME NATIONAL HISTORIC SITE IN THE COMMONWEALTH OF MASSACHUSETTS, AND FOR OTHER PURPOSES.

MARCH 3, 1988

Mr. Chairman and Members of the Committee, it is a pleasure to be here today to discuss H.R. 2652, a bill to revise the boundaries of Salem Maritime National Historic Site in the Commonwealth of Massachusetts, and for other purposes.

We recommend enactment of H.R. 2652.

As passed by the House of Representatives on October 5, 1987, H.R. 2652 would revise the boundaries of Salem Maritime National Historic Site to include approximately 0.07 acre of land on the corner of Derby Street and Palfrey Court in the Derby Street Historic District. On this land is located a 3-story, red brick masonry building constructed in 1909 and formerly used as a private club by the St. Joseph's Roman Catholic Polish Club.

Salem Maritime National Historic Site was established by Secretarial Order on March 17, 1938, to commemorate the maritime history of New England and this Nation. This 8.95-acre national historic site preserves buildings and wharves typical of the historical period of the original maritime scene along Salem Harbor.

Since the establishment of the site, the National Park Service has used the existing park structures for visitor, operational, and administrative purposes. Initially these actions were efficient and provided for a satisfying visitor experience as well as proper resource preservation and park administration. However, with the passage of time, the visitation to this site has increased to over 800,000 visitors per year so that the

United States Department of the Interior

OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

MAR 31

Honorable Dale Bumpers
Chairman, Subcommittee on Public Lands,
National Parks and Forests
Committee on Energy and Natural Resources
United States Senate
Washington, D.C. 20510

Dear Senator Bumpers:

At the hearing before your Subcommittee of March 3, concerning S. 1544, the proposed "National Trails System Improvements Act of 1987," this Department's witness promised to provide recommended amendments to the bill that addressed our concerns. The amendments are enclosed.

Sincerely,

Philip G. Kiko
Philip G. Kiko
Legislative Counsel

Enclosure

DEPARTMENT OF THE INTERIOR AMENDMENTS TO S. 1544

1. On page 2, lines 5 through 15, strike paragraphs (2) through (4) and insert the following:

   "(2) many miles of public land rights-of-way have been granted to the railroads by the United States, and much of this mileage could be suitable for trail use at such time as it may be abandoned; and

   "(3) the United States should retain whatever residual interest it may have in such public land rights-of-way and relinquish it, where appropriate, in favor of State and local governments or other nonprofit entities for trail purposes."

This amendment strikes the three findings that refer to the need for funding and substitutes two findings that state public policy with respect to the use of abandoned rights-of-way for trail purposes.

2. On page 2, strike lines 16 through 25 and insert the following, and redesignate proposed new subsections (d), (e), and (f) as (c), (d) and (e) respectively:

   "Sec. 3. The Act entitled, "An Act to provide for the disposition of abandoned portions of rights of way granted to railroad companies," approved March 8, 1922 (42 Stat. 414; 43 U.S.C. 912), is amended by inserting '(a)' after 'That' the first place it occurs and adding the following new subsections:

      '(b) Commencing upon the date of enactment of this subsection, whatever right, title, interest, and estate the United States may have in such rights of way described in subsection (a) shall be retained by the United States, except to the extent that any such";

   and on page 3, line 3, strike "such Act" and substitute "subsection (a)".

This amendment changes the thrust of the bill from an amendment to the National Trails System Act to an amendment to the basic law governing abandoned public land rights-of-way.

Mr. MOTT. Thank you very much.

Mr. Chairman.

Senator METZENBAUM. Do you want to comment also on the Salem Maritime Bill? Do you want to comment on that at the same time?

Mr. MOTT. Yes, I would like to present our testimony for the record, but just briefly, we think that it is very important to acquire this piece of property because now we are utilizing some of our historic structures for administrative purposes, for maintenance and storage and so forth. Because of the interest in this project and the increased attendance, we need additional space, and this particular building will provide that space for us. We recommend the enactment of the bill.

[The prepared statement of Mr. Mott on H.R. 2652 follows:]

3. On page 4, line 3, strike "transfer" and insert "release and quit claim"; in line 4 after "interest" insert ",if any,"; and in line 11 strike "transferred" and insert ",if any, released".

This amendment deletes language that could be construed as an assertion by the United States of title to an interest in land that it may not in fact have.

4. On page 4, insert the following after the period in line 13:

> "Any such release and quitclaim shall be on the express condition that such unit or entity assume full responsibility for any legal liability arising out of such quitclaim or use."

This amendment adds language similar to that in section 8(d) of the National Trails System Act with respect to liability.

5. On page 4, strike lines 14 through 25; on page 5, strike lines 1 through 5; and on page 3, line 23, delete "(1)".

This amendment deletes unnecessary sales authority and language designating the Trails Fund to receive receipts of sales of right-of-way interests.

6. Beginning on page 5, line 15, through page 7, line 24, strike section 4 in its entirety.

This amendment deletes section 4, which establishes a new Trails Fund and authorizes appropriations for the fund and for administration of this Act.

7. Amend the title to refer to an amendment of the Act of March 8, 1922, and omit reference to the National Trails System Act.

mixing of visitor and administrative functions within historic structures has resulted in a diminished visitor experience, administrative ineffectiveness,and unwarranted impacts to the unit's resources.

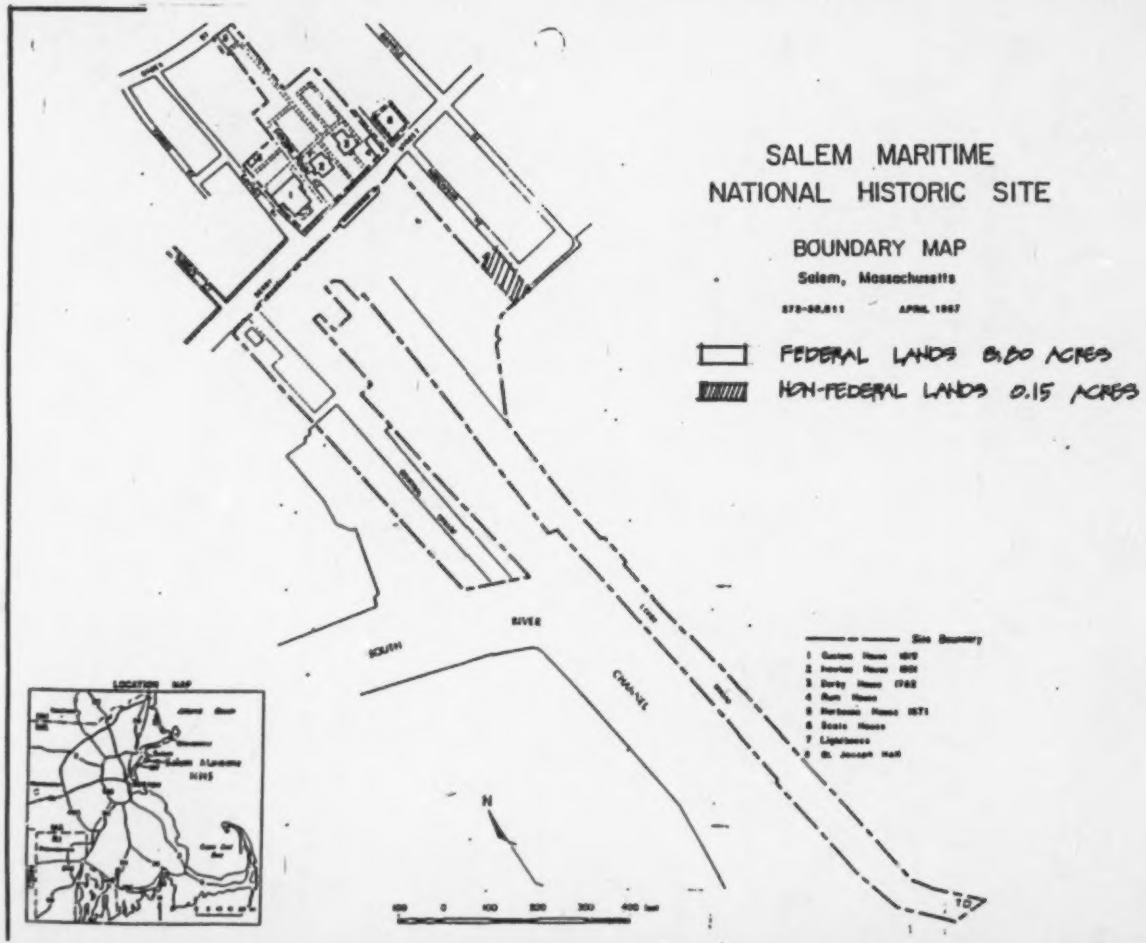
To be more specific, with the exception of the 1670 Narbonne House and the contemporary comfort station, park structures accommodate a mixture of visitor and interpretive uses, maintenance operations and storage, artifact and archive storage, and administrative activities simultaneously.

A good example of thc tight occupancy of park structures is the Custom House, a structure built in 1819. In the basement, a maintenance shop is located along with interpretive staff offices and artifact storage. The first floor and half of the second floor is open for visitor use and park interpretation. The other half of the second floor is office space, and the unheated attic is filled with stored artifacts. Park visitors inadvertently enter offices and maintenance areas, which not only interrupts work but also creates inconvenience and confusion for the visitor. Therefore, the inclusion of St. Joseph's Hall would provide the flexibility of moving the maintenance, operations, and administrative activities from three of the park's most significant structures (the 1819 Custom House, the 1761 Derby House, and the 1775 Hawkes House) to the St. Joseph's Hall. This action would relieve the overcrowded conditions and would greatly reduce the destructive wear and tear on the historic fabric within the park.

Further, the inclusion of St. Joseph's Hall within the boundary is documented in the planning and research document approved in 1986 entitled "Park Building Use and Operational Space Analysis: Salem Maritime National Historic Site, Salem, Massachusetts". This acquisition, therefore, would meet minimum documented management needs of the park and would, at the same time, contribute to local historic preservation efforts. Located in one of Salem's historic districts, this building has been vacant for two years due to strong neighborhood resistance to any development that would increase neighborhood densities. There appears to be strong support locally for the inclusion of this structure within the park boundaries. Finally, the estimated cost of acquisition of this building is approximately $260,000.

As Salem Maritime National Historic Site approaches its 50th anniversary, Mr. Chairman and Members of the Committee, the pressures upon park resources continue to increase, especially since the park is participating as a designated site in the bicentennial celebrations of both the U.S. Constitution this year and the U.S. Custom Service in 1988. The enactment of H.R. 2652 could assist in addressing some of these pressures. However, fiscal constraints may prevent us from taking action in the immediate future to acquire the property proposed to be included. The acquisition of this property must be weighed among other land acquisition priorities. We are now proposing land acquisition funds only for deficiency court awards and for emergency and hardship acquisitions. We do not intend to request additional appropriations to purchase this property. We plan, instead, to review the current list of properties planned to be acquired to determine whether or not funds can be reprogrammed for this purpose. We will also explore opportunities to seek non-Federal sources of funding. With that understanding, Mr. Chairman, we recommend enactment of H.R. 2652.

That concludes my prepared statement, Mr. Chairman. I would be happy to respond to any questions that you or other members of the Committee may have.


SALEM MARITIME
NATIONAL HISTORIC SITE
BOUNDARY MAP
Salem, Massachusetts
373-80,011
APRIL 1987
FEDERAL LANDS 8.80 ACRES
NON-FEDERAL LANDS 0.15 ACRES
Site Boundary
1 Custom House 1819
2 Hawkes House 1801
3 Derby House 1762
4 Rum House
5 Narbonne House 1671
6 Scale House
7 Lighthouse
8 St. Joseph Hall
SOUTH
RIVER
CHANNEL
N
LOCATION MAP
Salem Maritime NHS
0 100 200 300 400 feet

Senator **Metzenbaum**. Senators Kennedy and Kerry both have statements in support of this bill, and we will include them in the record. They could not be with us this afternoon.

Thank you very much.

[The prepared statements of Senator Kennedy and Senator Kerry follow:]

STATEMENT OF SENATOR EDWARD M. KENNEDY
ON H.R. 2652 BEFORE THE PUBLIC LANDS, NATIONAL PARKS AND FORESTS SUBCOMMITTEE
MARCH 3, 1988

I wish to thank the Chairman and members of the Public Lands, National Parks and Forests Subcommittee for convening this hearing. I would like to express my support for H.R. 2652, a bill to revise the boundaries of the Salem Maritime National Historic Site in Massachusetts.

This legislation would extend the boundaries of the Salem National Park to enable Salem Maritime to purchase the St. Joseph's Polish Roman Catholic Society building. Park acquisition of the building would enable Salem Maritime to acquire needed office space and enable personnel to vacate the historic Customs House which is currently being used for administrative purposes. The additional space will allow Salem Maritime to exhibit historic projects at the Customs House.

This legislation requires no appropriation by Congress. Rather, it is a simple, noncontroversial bill that has the support of the National Park Service and the Salem community.

Established in 1938, the Salem Maritime National Historic Site is the oldest site in the National Park Service. It has vast historic significance in its preservation and interpretation of the history of maritime shipping and commerce. For more than two centuries, Salem has served as a major port in our country. Historically, it was the only major American port not closed by the British during the American Revolution.

Following the War, the Salem merchant and maritime community established a flourishing trade throughout the world including China, India, and Sumatra. Customs duties from these ports made substantial contributions to our nation's revenues.

Today, Salem Maritime National Historic Site includes several historic wharves, the Custom House, warehouses and homes for merchants and laborers. It is important that the resources of the Salem Maritime National Historic Site be prudently managed so that the 800,000 annual visitors to the Park can appreciate its historic significance. Enactment of this legislation will ensure the effective use of the facilities for the benefit of citizens and visitors to the City of Salem.

I respectfully urge my colleagues on the Public Lands, National Parks and Forest Subcommittee to act favorably on this legislation.

John F. Kerry

Statement by Senator John Kerry
Senate Subcommittee on Public Lands, National Parks and Forests on H.R. 2652
March 3, 1988.

Mr. Chairman, I want to commend you for holding today's hearing on H.R. 2652. The legislation is quite simple yet its consequences are far-reaching in preserving a piece of American maritime history.

H.R. 2652 has been endorsed by the National Park Service. It will permit the National Park Service to expand its boundary at the Salem Maritime National Historic site in Salem Massachusetts by .07 of an acre. This action will enable the Park Service to acquire an adjacent building, the St. Joseph's Polish Hall, which is badly needed to house historic archives and documents as well as to serve as space for maintenance and administration of the park.

Established in 1938, the Salem Maritime Historic site is one of the oldest parks in the country. It is located in the historic sections of Salem and sits on nine acres of federal land. The site is designed to display typical maritime life along Salem harbor during the late eighteenth and nineteenth centuries. It is a tribute to the ships, seamen, sailors and fishermen who played a vital economic and cultural role in Salem's history, and in the building of the America we know today.

Currently, the majority of the park's activities takes place in three buildings--the 1819 Custom House, the 1761 Derby House and the 1775 Hawkes house. Activities include administration, operations, storage and most, importantly, visitation. Today, as an increasing number of individuals seek to learn more about American maritime history, the park is finding it difficult to accommodate the necessary multi purpose uses with its limited space. Last year, a record 800,000 people visited the Salem Maritime Historical Site. And with future plans to expand and turn the historic site into a full fledged historic park, for all to experience and learn from, the burdens on these historic structures will only get greater.

The St. Joseph's Polish Hall holds the key to addressing this problem. Built in 1910, not only will the park be adding an important historic building to help add to the preservation of this nation's maritime history, but it will also solve the overcrowding and stress that is currently agrivating the exisiting park structures. In additon, it will enable the Park Service to house and preserve ctitical historic documents and archives. For example, the hall will be used to store and display records from the U.S. Customs service dating back to the early 1800's. These records not only include activities at the Salem Custom's house, but include records from five northern Massachusetts ports. These documents teach America's history and detail and vividly--we must preserve this great treasure from our past.

Salem has contributed greatly to American maritime history and to American economic history. Once a main port for the bustling and lucrative East Indian trading of the colonial days and a major port during the Revolutionary War, and later a key port for historic naval operations and the Merchant Marine, today Salem's waterfront has fallen on hard times. Wharves are leaning into the ocean, sea walls are collapsing, and historic forts are closed and decaying. But none the less, the Salem water front has a bright and prosperous future if we help.

The Salem Partnership, a group of business and community leaders, including state and local officials, envision a true renaissance in historic Salem and Mr. Chairman I too share that vision. Private, state and local funds have already been used to begin to turn the Salem site into a Salem Park and give the community what it needs to enhance and preserve a once-thriving maritime port.

Mr. Chairman and members of the Committee, this year we celebrate the 50th anniversary of the Salem Maritime National

Historical Site. I cannot think of a better birthday present than to pass this legislation and permit the boundary change. Through such action Mr. Chairman, we will in fact be giving the National Park Service and the City of Salem, the necessary space to begin their renaissance. I ask for its expedited consideration and thank the committee for holding today's hearing.

Senator **Metzenbaum**. Mr. F. Dale Robertson, Chief of the Forest Service, the Department of Agriculture.

We normally ask our witnesses to confine their statements to about 5 minutes. Mr. Mott did that, and we will put the entire statement in the record.

If you would be good enough to do the same, Mr. Robertson, we would appreciate it.

STATEMENT OF F. DALE ROBERTSON, CHIEF, FOREST SERVICE, U.S. DEPARTMENT OF AGRICULTURE

Mr. **Robertson**. I would be glad to do that, Mr. Chairman.

Well, first, I want to tell you the Forest Service strongly supports the rails-to-trails concept. We believe that converting certain abandoned railroad rights-of-ways to trails would help meet the growing demand for hiking and outdoor recreation.

We just have two problems with this bill. One is the private property rights issue. There are some legal questions about just what are the Federal Government's reserve property rights under the various statutory authorities granting railroad rights-of-ways, and we do not believe that it will be an easy or a simple task to untangle these potential property rights issues which will have to be done on a case-by-case basis.

I believe, Senator Metzenbaum, you have asked the Department of Interior to answer or respond to some of these legal questions, and the Forest Service will defer to the legal judgment of the Department of Interior on this matter.

Secondly, in view of the Federal deficit problem, we do not support the Trails Fund. I suspect that in some cases the cost of clearing land title and doing all of the legal work associated with abandoned railroad rights-of-ways would cost more than the value of the right-of-way.

In summary, if we can clear up the legal questions on property rights and deal with the Trails Fund, the Department of Agriculture supports this bill.

[The prepared statement of Mr. Robertson follows:]

STATEMENT OF
F. DALE ROBERTSON, CHIEF
FOREST SERVICE
UNITED STATES DEPARTMENT OF AGRICULTURE

Before the
Subcommittee on Public Lands, National Parks and Forests
Committee on Energy and Natural Resources
United States Senate

Concerning S. 1544, National Trails System Improvements Act of 1987

March 3, 1988

MR. CHAIRMAN AND MEMBERS OF THE SUBCOMMITTEE:

Thank you for the opportunity to offer the Department of Agriculture's views on S. 1544, a bill "To amend the National Trails System Act to provide for cooperation with State and local governments for the improved management of certain Federal lands, and for other purposes."

We support the concept of converting abandoned railroad rights-of-way to trails. However, we believe S. 1544 would probably do more to confuse land titles than to expand the national network of trails.

The Department of Agriculture would support S. 1544 if it were amended to resolve several questions related to private property rights, to delete section 4 which would establish a new Trails Fund and authorize additional appropriations, and to delete unnecessary new authority for the transfer or sale of Federal property interests.

S. 1544 would amend section 9 of the National Trails System Act ("Trails Act") by adding several new subsections. Enactment of S. 1544 would require that any right, title, interest, and estate of the United States in all rights-of-way granted to railroad companies for use as a railroad or for railroad structures would remain in the United States upon the abandonment or forfeiture of such rights-of-way. An exception would be made for those rights-of-way included within a public highway within 1 year after abandonment.

Abandoned rights-of-way retained by the United States within the boundaries of a National Forest or a conservation unit would be added to that Forest or unit and managed accordingly. All such rights-of-way outside the boundaries of a conservation unit or a National Forest, but adjacent to or contiguous with any public lands, would be managed by the Secretary of the Interior pursuant to the Federal Land Policy and Management Act of 1976. Under certain conditions, the Secretary of the Interior would be authorized to transfer such lands to a unit of State or local government or to sell any portion of the retained rights-of-way.

S. 1544 would establish a revolving trails development fund to be known as the Trails Fund. The fund would consist of appropriations made by Congress, funds from the sale of any retained railway rights-of-way, donations, and interest on the fund. The fund would be managed by the Secretary of the Interior for acquisition of new trails or construction or reconstruction of existing trails. The Secretary of the Interior would be authorized to make loans from the fund to qualifying organizations and governmental units for trail purposes.

This bill pertains to residual property rights of the United States. Enactment could affect thousands of rights-of-way conveyances made under a variety of statutory authorities and require complicated interpretations of public land law pertaining to residual rights of the United States.

Section 3 assumes that the United States has some remaining residual interest in certain railway rights-of-way which could be converted to recreation trail uses. That may or may not be the case.

Upon abandonment, rights-of-way across National Forest System lands that were granted under the Act of March 3, 1875 (43 U.S.C. 934) generally vest to the United States upon abandonment. Rights-of-way granted under other authorities must be individually examined to determine the status of the rights-of-way if the railway is abandoned.

In our experience, and from review of selected railroad grants affecting National Forests, it appears that the United States has residual property interests in few, if any, rights-of-way over private land within National Forest boundaries. Under current law, (43 U.S.C. 912) if the United States has some residual property rights in abandoned rights-of-way over private land, those rights would pass to the owner of the underlying land, subject to certain state rights to use the rights-of-way for roads.

The proposed bill would implicitly repeal 43 U.S.C. 912, thereby reversing the public policy set in 1922 with regard to abandoned right-of-ways. It is unclear what effect this would have on rights already vested under section 912. It is also unclear what the effects would be on land titles affected by rights-of-way. Section 912 was enacted, in part, to provide a cost effective and expeditious means of clearing title to patented land. If the process for dealing with abandoned rights of way is to be changed, it ought to be done by direct amendment of section 912 with full consideration of the impacts on land titles and the potential taking issues.

S. 1544 is inconsistent with the provisions of most state laws which provide that rights in an abandoned easement merge with the underlying fee title. Adjacent property owners have an expectation of being the successors to the rights in abandoned rights-of-way. When dealing with potential clouds on private land titles, we see a compelling reason to be as consistent as possible with state property laws. This bill does not do that. We are concerned that enactment of this bill will complicate land titles by interposing the Federal Government in chains of title to land long ago patented from the public domain. This will inevitably lead to litigation.

We do not support the creation of a Trails Fund. This fund would probably cost more to administer than any benefits it would generate.

We again would like to emphasize that we support the concept of "rails to trails". However, the concerns we have raised must be appropriately addressed in any bill that we would support. We would be pleased to work with the subcommittee to develop a mutually acceptable bill.

This concludes my testimony. I would be pleased to answer any questions you may have.

Senator METZENBAUM. Very good. Thank you very much.

Mr. Robertson, I think that you indicate that there may be some legal questions, but I would guess that Congress could determine the nature of the Federal easement that has been granted, and that if there be litigation that results from such legislation as we enact, so be it. It would not be the first time. But I think we have to meet our responsibility anyhow and do what we think is right, and then if the courts rule that we have overstepped our bounds, we can come back and try to do it over again if that be necessary.

I very much appreciate your support of this bill and look forward to working with you.

Mr. ROBERTSON. We would like to work with the committee as we go through this.

Senator METZENBAUM. Thank you.

Mr. ROBERTSON. Thank you, Mr. Chairman.

Senator METZENBAUM. It is my understanding that the Honorable Beverly Byron has joined us.

We would be very happy to hear from you, Congresswoman.

STATEMENT OF HON. BEVERLY B. BYRON, U.S. REPRESENTATIVE FROM MARYLAND

Mrs. BRYON. Thank you, Senator.

Let me apologize for being a little late. I was Chairing a hearing and then we had two votes on the Floor, and as you know, they never come at a convenient time.

Senator METZENBAUM. We understand.

Mrs. BYRON. But let me say that I am delighted to be here today to discuss an issue that I find of great personal interest to me, and that is the preservation and the expansion of the American Trails System.

I serve as a Board Member of the American Hiking Society, so consequently I am very interested in our Trails System and its maintenance and the increase of it.

As a hiker myself, I am glad to have the opportunity to lend my support to S. 1544, the Senate companion bill to one that I have introduced in the House, which is H.R. 2641. And these bills, as many already know, would provide for the conversion of abandoned rail right-of-way to trails use whenever possible. When such a conversion is not feasible, the right-of-way can be sold, the proceeds of which would be placed in a trust fund to be used for the purchase of land for trails nationwide.

I think the conversion of the right-of-way bill is an issue, one that very few can argue with. And I think the lands were originally given by the government to the railroad companies in the heyday of our rail expansion for the purpose of rail construction. Since that time, as we know, many, many miles of right-of-ways have been abandoned, and I think we should once again put them back to good use for the public.

Many of these tracts lend themselves extremely well to conversion, and what better way to make use of those lands than to meet the growing demand that we are seeing for trails brought forth by the Americans' most popular outdoor fitness pastime.

With the proper program to facilitate the conversions of these miles, the possibilities are endless. I think one of the most significant aspects of this legislation is it recognizes the role that the State and the local governments and the organizations can play in the trail development stage.

State and local agreements often do not have the ability to acquire the lands for trail development on their own, and so these two bills enable the Secretary of Interior to allow States and local governments to manage portions of the right-of-way. Such a system enables our State and local governments and organizations to acquire trail lands which otherwise they would not ever be able to achieve.

The bill's revolving loan fund would also serve as a means by which State and local governments and trail groups could purchase trails. In many instances a local government or organization is not able to muster the funds necessary in the restrictive time period that the Interstate Commerce Commission allows. The loan fund would give these groups greater flexibility and much more time to coordinate the monies that they know they have access to but perhaps not at a short notice of time.

Furthermore, sums borrowed from the fund would be paid back for others to use.

I think we have seen in the last 20 years a tremendous number of Americans participating in hiking or walking for pleasure. It has almost more than tripled than in the past, while we find runners, bikers, and horseback riders are now approaching many of their local elected officials with a unified voice on finding trails and more areas for them to utilize.

I think these two bills provide a mechanism whereby government can couple the abandoned rail right-of-way with the growing demand for trails at little cost to the Federal Government.

I can remember testifying in Annapolis about 12 to 15 years ago on a trail right-of-way bill for the Maryland State Physical Fitness Commission, so it is not something that I have gotten involved in just recently. It goes way back.

Mr. Chairman, in closing, I would like to say that I am very excited about the prospect of your legislation. As you know, we will be holding hearings on our side in the Parks and Public Lands Subcommittee on March 17, and I very much look forward to a positive effect on these two bills with the development of our trail network and trail system nationwide.

[The prepared statement with attachment submitted by Mrs. Byron follows:]

STATEMENT FOR REPRESENTATIVE BEVERLY BYRON
SENATE RAILS TO TRAILS HEARING, S.1544
MARCH 3, 1988

THANK YOU, MR. CHAIRMAN.
I AM PLEASED TO BE HERE TO DISCUSS AN ISSUE OF GREAT PERSONAL INTEREST TO ME--THE PRESERVATION AND EXPANSION OF AMERICAN TRAILS. AS A HIKER MYSELF, I AM ESPECIALLY GLAD TO HAVE THE OPPORTUNITY TO LEND MY SUPPORT TO S.1544, THE SENATE COMPANION TO A BILL THAT I HAVE INTRODUCED, H.R. 2641. THESE BILLS, AS MANY HERE ALREADY KNOW, WOULD PROVIDE FOR THE CONVERSION OF ABANDONED RAIL RIGHTS-OF-WAY TO TRAIL USE WHENEVER POSSIBLE. WHEN SUCH A CONVERSION IS NOT FEASIBLE, THE RIGHT-OF- WAY CAN BE SOLD, THE PROCEEDS FROM WHICH WOULD BE PLACED IN A TRUST FUND TO BE USED FOR THE PURCHASE OF LAND FOR TRAILS NATIONWIDE.

IN MY EYES, THE CONVERSION OF THE RIGHTS-OF-WAY IS AN ISSUE WITH WHICH FEW CAN ARGUE. THESE LANDS WERE ORIGINALLY GIVEN BY THE GOVERNMENT TO THE RAILROAD COMPANIES IN THE HEYDAY OF RAIL EXPANSION FOR THE PURPOSE OF RAIL CONSTRUCTION. SINCE THAT TIME, MANY MILES OF THE ISSUED RIGHTS-OF-WAY HAVE BEEN ABANDONED AND SHOULD NOW BE PUT TO GOOD PUBLIC USE.

MANY OF THESE TRACTS LEND THEMSELVES WELL TO TRAIL CONVERSION... AND WHAT BETTER WAY TO MAKE USE OF THESE LANDS THAN TO MEET THE GROWING DEMAND FOR TRAILS BROUGHT FORTH BY AMERICA'S MOST POPULAR OUTDOOR FITNESS PASTIMES?

WITH THE PROPER PROGRAM TO FACILITATE THE CONVERSION OF THESE MILES, THE POSSIBILITIES ARE ENDLESS. PERHAPS ONE OF THE MOST SIGNIFICANT ASPECTS OF THIS LEGISLATION, IS THE RECOGNITION OF THE ROLE THAT STATE AND LOCAL GOVERNMENTS AND ORGANIZATIONS CAN PLAY IN TRAIL DEVELOPMENT.

STATE AND LOCAL GOVERNMENTS OFTEN DO NOT HAVE THE ABILITY TO ACQUIRE LANDS FOR TRAIL DEVELOPMENT ON THEIR OWN. S. 1544 AND H.R. 2641 ENABLE THE SECRETARY OF THE INTERIOR TO ALLOW STATE AND LOCAL GOVERNMENTS TO MANAGE PORTIONS OF RIGHTS-OF-WAY. SUCH A SYSTEM ENABLES STATE AND LOCAL GOVERNMENTS AND ORGANIZATIONS TO ACQUIRE TRAILS LANDS WHICH OTHERWISE THEY WOULD NOT BE ABLE TO.

THE BILL'S REVOLVING LOAN FUND WOULD ALSO SERVE AS A MEANS BY WHICH STATE AND LOCAL GOVERNMENTS AND TRAIL GROUPS COULD PURCHASE TRAILS. IN MANY INSTANCES, A LOCAL GOVERNMENT OR ORGANIZATION IS NOT ABLE TO MUSTER THE FUNDS NECESSARY IN THE RESTRICTIVE TIME PERIOD THAT THE INTERSTATE COMMERCE COMMISSION ALLOWS. THE LOAN FUND WOULD GIVE THESE GROUPS GREATER FLEXIBILITY AND MORE TIME TO COORDINATE MONEY THAT THEY KNOW THEY HAVE ACCESS TO BUT PERHAPS NOT AT SHORT NOTICE. FURTHERMORE, SUMS BORROWED FROM THE FUND WOULD BE PAID BACK FOR OTHERS TO USE.

STATEMENT FOR REPRESENTATIVE BEVERLY BYRON
RAILS TO TRAILS HEARING, S. 1544
MARCH 3, 1988
PAGE 2

IN THE LAST TWENTY YEARS, THE NUMBERS OF AMERICANS PARTICIPATING IN HIKING OR WALKING FOR PLEASURE HAS MORE THAN TRIPLED, WHILE PARTICIPATION IN BIKING HAS QUADRUPLED. AS A RESULT, HIKERS, RUNNERS, BIKERS AND ALSO HORSEBACK RIDERS ARE NOW APPROACHING THEIR ELECTED OFFICIALS WITH A UNIFIED VOICE CALLING FOR MORE TRAILS. S. 1544 AND H.R. 2641 PROVIDE A MECHANISM WHEREBY THE GOVERNMENT CAN COUPLE THE ABANDONED RAIL RIGHTS-OF-WAY WITH THE GROWING DEMAND FOR TRAILS--AND AT LITTLE COST TO THE FEDERAL GOVERNMENT.

MR. CHAIRMAN, IN CLOSING, I WOULD LIKE TO SAY HOW EXCITED I AM ABOUT THE PROSPECTS OF THIS LEGISLATION. AS YOU MAY KNOW, H.R. 2641 WILL BE THE SUBJECT OF A HEARING IN THE PARKS AND PUBLIC LANDS SUBCOMMITTEE OF THE HOUSE INTERIOR COMMITTEE ON MARCH 17. I AM VERY MUCH LOOKING FORWARD TO THE POSITIVE EFFECTS THAT S. 1544 AND H.R. 2641 WILL HAVE ON THE DEVELOPMENT OF TRAILS NATIONWIDE.

Congressional Research Service
The Library of Congress

Washington, D.C. 20540

July 17, 1987

To: Honorable Beverly B. Byron
Attention: Beth Dillon

From: American Law Division

Subject: Taking Issues Raised by Draft Trails Bill

You have asked us to give you an opinion as to whether a draft bill that proposes the retention by the federal government of title to rights of way across federal lands constitutes a "taking" of property for which compensation is owed under the Fifth Amendment of the Constitution.

As you can see from the enclosed report, Congress has at various times authorized rights of way across federal lands, with the federal government retaining title to all property interests except the easement rights granted, and retaining title to the reversionary interest when the rights of way are no longer used for the purposes granted. In a 1922 statute, Congress provided for the disposition of the federal reversionary interest in railroad rights of way by providing, basically, that title to an abandoned or forfeited railroad right of way would be divided between adjacent landowners.

The draft bill prospectively makes a different disposition of the federal interest--retaining title to abandoned or forfeited rights of way in the federal government in order to facilitate their subsequent use as part of the National Trails System. The bill does not affect existing, vested titles, and there can be no doubt that the federal government can make whatever disposition of its own property it chooses. Under Art. IV, section 3 of the Constitution, Congress has the power to make all needful regulations respecting federal property.

Therefore, we conclude that the draft bill does not "take" any private interest in property.

We hope this information is helpful to you.

Pamela Baldwin
Legislative Attorney
July 17, 1987

Congressional Research Service
The Library of Congress

Washington, D.C. 20540

FEDERAL RAILROAD RIGHTS OF WAY

Pamela Baldwin
Legislative Attorney
American Law Division
February 2, 1984

Executive Summary

During the drive to settle the western portion of the United States, Congress sought to encourage the expansion of railroads, at first through generous grants of rights of way and lands to the great transcontinental railroads between 1862 and 1871, and later through the enactment of a general right of way statute. The 1875 General Railroad Right of Way Act permitted railroads to obtain a 200-foot federal right of way by running tracks across public lands. Some railroads also obtained a right of way by private purchase or by exercising state or federal powers of eminent domain. Therefore, the property interest of a railroad in a particular right of way may vary. The courts have characterized the interest held by a railroad pursuant to a federally granted right of way as a "limited fee" in the case of a land grant right of way, or as an easement in the case of a right of way under the 1875 Act.

Whether a particular railroad obtained a federal right of way as part of a land grant or under the 1875 Act, the grants have been interpreted as being conditional, with a reversionary interest in the United States; that is, if the right of way ceases to be used for railroad purposes, the granted interest reverts to the United States, and Congress may provide for its disposition.

As railroads closed rail lines, questions arose as to the disposition of the lands within the former rights of way. Many individual instances were resolved in separate legislation. In 1922, Congress enacted general legislation to provide that former railroad rights of way become the property of the adjacent landowner or municipality through which the right of way passed. This legislation is ambiguous in several respects, particularly as to what procedures are sufficient to constitute an abandonment of a right of way for purposes of triggering the statute.

Controversies continue to arise surrounding the disposition of rights of way, because of issues as to the nature of the interest held by the railroad, the validity of possible attempts by the railroad to convey all or part of that interest, ambiguities associated with dating abandonment for purposes of the federal disposal statute, and disputes between adjacent landowners over perceived entitlements to lands within a particular right of way.

FEDERAL RAILROAD RIGHTS OF WAY

The middle of the nineteenth century witnessed a burst of federal legislation fostering the construction of major railroads in America.[1] Many factors contributed to this legislative initiative, among them the discovery of gold in California, the impending civil war, the absence after secession of opposing votes by southern states, and a desire to encourage the settlement and development of the vast new western territories, thereby increasing tax revenues, opening markets, and providing more adequately for the defense of the West. There was also, of course, the judgment that transcontinental rail lines could not be built without substantial Federal assistance. The grants sometimes consisted only of a right of way across public lands, but sometimes also included a greater subsidy in the form of additional grants of land, financial support, or both. Some grants were made to states to be conveyed by them to a railroad company upon completion of specified segments of line. Other grants were made to railroad corporations directly. Usually this latter course was followed if the route was to cross territories rather than states. Typically, in this latter instance, a federally chartered corporation was created by the same legislation that established the land grants.

Several transcontinental railroads were authorized within the same decade, including the Union Pacific/Central Pacific in 1862, and 1864,[2] the Northern

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[1] See J.B. Sanborn, Congressional Grants of Land in aid of Railroads; P.W. Gates, History of Public Land Law Development, ch. XIV (1968).

[2] Act of July 1, 1962, ch. 120, 12 Stat. 489 and Act of July 2, 1864, ch. 216, 13 Stat. 356.

Pacific in 1864,[3] the Atlantic and Pacific in 1866,[4] and the Texas Pacific in 1871.[5] The terms of grants varied, but all received a right of way and some additional land grants. Other, nontranscontinental railroads also received grants to begin operation.

By the time the fourth transcontinental line was authorized in 1871, vehement opposition was developing to the railroads that only a few short years before had received such enthusiastic support. As one historian put it, when the West "... saw evidence that railroads were not prompt in bringing their lands on the market and putting them into the hands of farm makers, the West turned from warm friendship to outright hostility to railroads."[6]

This hostility was reflected in a cessation of Congressional land grants to railroads.[7] Congress did, however wish to continue to encourage the expansion of railroads across the western lands. Special acts continued to be passed that granted a right of way through the public lands of the United States to designated railroads, but this approach was burdensome. Congress had enacted provisions granting a right of way for the construction of "highways" over public lands not reserved for public uses,[8] and in 1875 enacted a statute known as the "General Railroad Right of Way Act."[9]

3/ Act of July 2, 1864, ch. 217, 13 Stat. 365 (1864).

4/ Act of July 27, 1866, ch. 278, 14 Stat. 292.

5/ Act of March 3, 1871, ch. 122, 16 Stat. 573.

6/ GATES, supra at 380.

7/ See Cong. Globe, 42d Cong., 2d Sess., 1585 (1872).

8/ See e.g. Act of March 3, 1855, ch. 200, 10 Stat. 683, and Act of July 26, 1866, ch. 262, 14 Stat. 253, R.S. 2477.

9/ Act of March 3, 1875, ch. 152, 18 Stat. 482, repealed and superseded by Act of October 21, 1976, Pub. L. 94-579, 90 Stat. 2793.

This Act granted a right of way two hundred feet wide across public lands and as codified at 43 U.S.C. 934 states in pertinent part:

> The right of way through the public lands of the United States is granted to any railroad company duly organized under the laws of any State or Territory, except the District of Columbia, or by the Congress of the United States, which shall have filed with the Secretary of the Interior a copy of its articles of incorporation, and due proofs of its organization under the same, to the extent of one hundred feet on each side of the central line of said road; also the right to take, from the public lands adjacent to the line of said road, material, earth, stone, and timber necessary for the construction of said railroad; also ground adjacent to such right of way for station buildings, depots, machine shops, side tracks, turnouts, and water stations, not to exceed in amount twenty acres for each station, to the extent of one station for each ten miles of its road.

Railroads also acquired some rights of way through the exercise of state power of eminent domain and through the exercise of federal power of eminent domain. In addition, some rights of way were simply purchased by the railroads. In the latter instance, the railroad obviously could hold full title to the right of way and the federal government none. In those instances in which the right of way was obtained by an exercise of the federal power of eminent domain, one would have to examine the particular authority for that exercise and also the particular condemnation proceedings to determine the scope and conditions of the title the railroad obtained.

In those instances in which the right of way was granted by the federal government either as part of a land grant or under a right of way statute, the federal government retains a property interest in the right of way.

The courts have interpreted the interest conveyed in federal railroad rights of way in various ways. The Supreme Court has said that a pre-1871 right of way granted to a land grant railroad was a "limited fee",[10] while the right of way granted under the 1875 statute was an easement.[11] More recent cases seem to indicate that the terminology may not be of vital importance; the significance of the terms used depends on the context in which an inquiry arises.[12]

It must be kept in mind that when Congress grants lands, the grant is both a grant of property and a law and, therefore, Congress is free to specify terms or elements different from those that otherwise would apply either by virtue of the common law or earlier statutes. A railroad grant also may be both a grant of lands and a contractual agreement that becomes binding upon the performance of certain acts by a railroad.[13]

A discussion of the property law terms involved may be helpful at this juncture.

Usually when land is granted to another owner, the conveyance is complete and final. It is possible, however, to convey less than full property rights, or to convey title to a grantee in such a manner that title may revert to the grantor in some circumstances.

If the interest conveyed is only the right to use the land for a particular purpose, the interest is an easement. If the interest conveyed is complete and includes all rights associated with the property, it is a

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[10] Northern Pacific R. Co. v. Townsend, 190 U.S. 267, 271 (1903), modified in United States v. Union Pacific Railroad Co., 353 U.S. 112 (1957).

[11] Great Northern Railway Co. v. United States, 315 U.S. 262, 271 (1941).

[12] See Wyoming v. Andrus, 602 F. 2d 1379 (10th Cir. 1979).

[13] United States v. Northern Pacific Railway Co., 256 U.S. 51 (1921)

"fee simple". There can be a gradation of interests between depending on the exclusivity of possession granted, the duration of the interest, and the completeness of the rights granted.

Both a "fee" interest or an easement may be conveyed in such a manner that the grantor retains a "reversionary" interest in the property which means that the property may in some circumstances revert to the grantor.

A grant may be made so that it continues only so long as some use or circumstance continues and if that use or circumstance ceases, then title reverts automatically to the grantor. This is called a determinable grant.

Or a grant may be interpreted as being made on the condition that if "x" occurs, then the grant reverts to the grantor. This is called a grant on a condition subsequent.

The principal difference between these two types of grants is that in the former instance, no action on the part of the grantor is necessary to reassert title; title reverts by action of law as soon as the envisioned use or circumstance ceases. In contrast, if the grant is deemed to be a grant on a condition subsequent, the grantor must take some action to reassert title upon the breach (or fulfillment) of the condition (depending on whether the grant and condition were worded positively or negatively). This action usually takes the form of a judicial proceeding to determine that the terms of the condition have in fact been met or breached. If the grantor is Congress, however, that further action may be either through a judicial determination or legislative action by Congress.

Although the courts have struggled at times to articulate the scope of the interest held by a railroad pursuant to the earlier land grant legislation, the cases are clear that the right of way interest, whether limited fee or easement, is conditioned on the continued use of the right of way for railroad purposes.[14] If an interest is granted on a condition: "No express provision for a forfeiture was required to fix the rights of Government. If an estate be granted upon a condition subsequent, no express words of forfeiture or reinvestiture of title are necessary to authorize the grantor to reenter in case of a breach of such conditions."[14] As to how this further action was to occur where the grantor was Congress, the Supreme Court has stated:

> In what manner the reserved right of the grantor for breach of the condition must be asserted so as to restore the estate depends upon the character of the grant. If it be a private grant, that right must be asserted by entry or its equivalent. If the grant be a public one it must be asserted by judicial proceedings authorized by law, the equivalent of an inquest of office at common law, finding the fact of forfeiture and adjudging the restoration of the estate on that ground, or there must be some legislative assertion of ownership of the property for breach of the condition, such as an act directing the possession and appropriation of the property, or that it be offered for sale or settlement. At common law the sovereign could not make an entry in person, and, therefore, an office-found was necessary to determine the estate, but, as said by this court in a late case, "the mode of asserting or of resuming the forfeited grant is subject to the legislative authority of the government. It may be after judicial investigation, or by taking possession directly under the authority of the government without these preliminary proceedings."15/

14/ The purposes of a railroad right of way may be interpreted broadly to mean for purposes of public transportation. See *Washington Wildlife Preservation, Inc. v. Minnesota*, 329 NW 2d 544, 547 (Minne. 1983), cert. denied 51 Law Week 3919.

15/ *Atlantic and Pacific Railroad Company v. Mingus*, 165 U.S. 413, 427-428 (1897).

16/ *Schulenberg v. Harriman*, 21 Wallace (88 U.S.) 44, 63-64 (1874).

Congress provided for the disposition of the federal reversionary interest in railroad rights of way in the Act of March 8, 1922.[17] As currently codified at 43 U.S.C. 912, the provisions state:

> Whenever public lands of the United States have been or may be granted to any railroad company for use as a right of way for its railroad or as sites for railroad structures of any kind, and use and occupancy of said lands for such purposes has ceased or shall hereafter cease, whether by forfeiture or by abandonment by said railroad company declared or decreed by a court of competent jurisdiction or by Act of Congress, then and thereupon all right, title, interest, and estate of the United States in said lands shall, except such part thereof as may be embraced in a public highway legally established within one year after the date of said decree or forfeiture or abandonment be transferred to and vested in any person, firm, or corporation, assigns, or successors in title and interest to whom or to which title of the United States may have been or may be granted, conveying or purporting to convey the whole of the legal subdivision or subdivisions traversed or occupied by such railroad or railroad structures of any kind as aforesaid, except lands within a municipality the title to which, upon forfeiture or abandonment, as herein provided, shall vest in such municipality, and this by virtue of the patent thereto and without the necessity of any other or further conveyance or assurance of any kind or nature whatsoever: *Provided*, That this section shall not affect conveyances made by any railroad company of portions of its right of way if such conveyance be among those which have been or may after March 8, 1922, and before such forfeiture or abandonment be validated and confirmed by any Act of Congress; nor shall this section affect any public highway on said right of way on March 8, 1922: *Provided further*, That the transfer of such lands shall be subject to and contain reservations in favor of the United States of all oil, gas, and other minerals in the land so transferred and conveyed, with the right to prospect for, mine, and remove same.

The statute is ambiguous as to which conveyances by a railroad are not intended to be affected: those "which have been or may hereafter and before such forfeiture or abandonment be validated." The provision is also unclear as to what proceedings suffice to constitute abandonment "declared or decreed by a court of competent jurisdiction."[18] The Congressional debate on the statute was limited and does not provide clarification of the intended meaning. The Committee report indicates:

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[17] Ch. 94, 42 Stat. 414.

> It seemed to the committee that such abandoned or forfeited strips are of little or no value to the Government and that in case of lands in rural communities they ought in justice to become the property of the person to whom the whole of the legal subdivision had been granted or his successor in interest. Granting such relief in reality gives him only the land covered by the original patent. The attention of the committee was called, however, to the fact that in some cases highways have been established on abandoned rights of ways or that it might be desirable to establish highways on such as may be abandoned in the future. Recognizing the public interest in the establishment of roads, your committee safeguarded such rights by suggesting the amendments above referred to protecting not only roads now established but giving the public authorities one year's time after a decree of forfeiture or abandonment to establish a public highway upon any part of such right of way.[19]

Although there is surprising little case law interpreting this section, the courts apparently have interpreted it as intended to embody with certain modifications the common law rule that land burdened with an easement passes with a conveyance of fee to abutting legal subdivision or tracts out of which it was carved, such that when the easement ceases, the subject land vests in the owner of that abutting tract.[20]

Controversies also arose as to the authority of the railroads to convey all or part of their interest in the rights of way, and the authority of private citizens to obtain rights to property within the rights of way through adverse possession or what might be characterised as "squatter's rights."

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[18] Note that Congress authorized the Interstate Commerce Commission to permit Railroad abandonments in the Act of February 28, 1920, ch. 91, 41 Stat. 477, currently codified at 49 U.S.C. 10903.

[19] S. Rep. No. 388, 67th Cong., 2d Sess. 1 (1922).

[20] See Fitzgerald v. City of Ardmore, 281 F. 2d 717 (10th Cir. 1960), and Wyoming v. Andrus, supra, at 1384.

The Supreme Court interpreted the grant of a federal right of way as a unit, no portion of which could be obtained for private purposes by adverse possession. —

> By granting a right of way four hundred feet in width, Congress must be understood to have conclusively determined that a strip of that width was necessary for a public work of such importance, and it was not competent for a court, in the suit of a private party, to adjudge that only twenty-five feet thereof were occupied for railroad purposes in the face of the grant....[21]

Similarly, the right of way purposes would be negated by the existence of the power of the railroad to alienate the right of way or any portion of it.[22]

Despite the limitations on the alienability of federal rights of way, the railroads purported to convey, and adjacent landowners continued to encroach upon rights of way and claim rights thereto. From time to time Congress fueled the fires by enacting legislation to legitimize both practices.[23]

Congress also authorized railroads to dispose of lands within the rights of way for highway purposes. In 1920, Congress authorized railroads to convey to state, counties, or municipalities, portions of rights of way to be used as public highways or streets provided the conveyance would not diminish the railroad right of way to less than 100 feet. As codified at 43 U.S.C. 913, this provision reads:

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[21] *Northern Pacific Railroad Company v. Smith*, 171 U.S. 260, 275 (1898), *Northern Pacific Railroad Company v. Townsend*, 190 U.S. 267 (1903), *Kindred v. Union Pacific Railroad Company*, 225 U.S. 582 (1912).

[22] *Townsend*, *supra* at 271.

[23] See e.g. the Act of April 28, 1904, ch. 1782, 33 Stat. 538 legalizing, validating, and confirming "all conveyances heretofore made" by the Northern Pacific Railroad Company of land forming a part of the right of way granted by the government provided that the conveyances did not diminish the right of way to less than two hundred feet; and the Act of June 24, 1912, ch. 181, 37 Stat. 138 legitimizing conveyances made by the Union Pacific Railroad and certain others of lands within the right of way granted the Union Pacific, and permitting adverse possession claims against the railroad in accordance with the laws of the state in which the land is situated.

> § 913. Conveyance by land-grant railroads of portions of rights-of way to State, county, or municipality
>
> All railroad companies to which grants for rights of way through the public lands have been made by Congress, or their successors in interest or assigns, are authorized to convey to any State, county, or municipality any portion of such right of way to be used as a public highway or street: Provided, That no such conveyance shall have the effect to diminish the right of way of such railroad company to a less width than 50 feet on each side of the center of the main track of the railroad as now established and maintained.[24]

Section 16 of the Federal Highway Act of 1921[25] gave the consent of the United states to any railroad or canal company to convey to the highway department of any state "any part of its right of way or other property in that State acquired by grant from the United States." Note that this provision did not mention the necessity for retaining the central right of way. It is arguable, however, that because the railroad is authorized only to convey "property acquired" from the United States, the reversionary interest of the United States could not be conveyed. Therefore, either the railroad must continue to use the tracks and immediate area necessary for railroad purposes or, if that use ceased, the railroad could not convey the

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24/ Act of May 25, 1920, ch. 197, 41 Stat. 621.

25/ Act of November 9, 1921, ch. 119, 42 Stat. 212, currently codified at 23 U.S.C. 316. The Act of August 27, 1958, Pub. L. 85-767, 72 Stat. 915, which revised Title 23, added the words "or its nominee" after "of any State" "so that in those instances where the county or other political subdivision is the proper party to hold title to the right-of-way, such action can be effected." H.R. Rep. No. 1938, 85th Cong. 2d Sess. 107 (1958).

central core that had been used for those purposes. The legislative history offers no clarification of this provision. Perhaps, reading the two statutes together, the 1921 enactment eliminated the specification that the retained central core be 100 feet in width.

Summary

Although Congress has on several occasions addressed the disposition of railroad rights of way, controversies may be expected to continue to arise because of issues as to the nature and source of the interest held by a railroad, and the validity of attempts by the railroad to convey all or part of that interest, ambiguities associated with dating abandonment for purposes of the federal disposal statute, and disputes between adjacent landowners over perceived entitlements to lands within a right of way. Congress has from time to time legitimized conveyances that otherwise would be invalid, and in other legislation has permitted certain general types of conveyances. The legal status of land within any particular right of way therefore depends on the interest held by the railroad, the general and particular applicable statutes, and the facts (especially as to dates) of a particular sequence of conveyances.

Pamela Baldwin
Legislative Attorney
Amercian Law Division
February 2, 1984

Senator METZENBAUM. Thank you very much, Congresswoman.

I am looking forward to working with you, and I hope you can move it forward on your side, and we will move it forward on our side.

Mrs. BYRON. Thank you very much.

Senator METZENBAUM. The next panel is Paul McCray, Steven McKee, Derrick Crandall, Stuart Northrop, David Burwell, and Susan Henley.

We are happy to have all of you with us today, and I will ask you to confine your statements to 5 minutes, and if you go to 3 minutes, you get a medal of honor.

Paul McCray, we are happy to hear from you first, sir.

STATEMENT OF PAUL McCRAY, NORTHERN VIRGINIA REGIONAL PARK AUTHORITY, FAIRFAX, VA

Mr. McCRAY. Mr. Chairman, my name is Paul McCray. It is a pleasure to testify before you today on behalf of the Northern Virginia Regional Park Authority.

Converting an abandoned railroad right-of-way to a multi-use trail can provide many unique opportunities and benefits to a community. The Washington and Old Dominion Railroad Regional Park is an excellent example, which I am the manager of.

The W&OD trail is 44 miles long, runs from the City of Alexandria out to Loudoun County, and along the way it runs through three counties, two cities, five towns, and many communities. When we are finished construction this year, we will have 44 miles of asphalt trail and 31 miles of gravel horse trail and jogging path. We estimate that over a million cyclists, joggers, hikers, horseback riders, cross country skiers, and skateboarders use the trail every year.

The most important benefit of the trail is as a recreational outlet. It brings parkland to many areas where none would be there anyway. Whether the people are out taking a leisurely stroll for a few blocks or they are on a 30 mile bike ride, it is there for them to use however they want.

During the week, the lunch hour is our busiest time on the trail when all the office workers get out on their lunch hour and try to relieve the stress of their workday.

Another major plus of the trail is the health benefit. Everyone that uses the trail gets some sort of exercise. And the rail to trail conversion is the best kind of trail because of the flat grade that the trains needed provides a trail that anyone can use no matter what their condition or circumstance is.

We have found economic benefits to our communities from the W&OD trail. We have found that properties along the trail that are for sale put signs in the back yard next to the trail as well as the front yard next to the road, and we have seen ads in the newspaper boasting of a property's prime location next to the W&OD trail.

So if the location to the trail becomes a selling point and a buying point, then I think this can only have a positive effect on land values.

The local businesses have prospered along the trail also. We have one little general store out in Loudoun County that has doubled its business on weekends since the trail came through, and we have one convenience store manager in Fairfax who has complained to me that he can't keep enough staff hired for weekends because of the trail traffic.

The operation of the trail is also an economic benefit to the community. Many people that have contacted me about rail to trail conversions have worried about whether or not the operation of the trail will be a financial burden to whatever agency is operating it, and we have not had that problem on the W&OD because rentals of pieces of property to local businesses and leasing of right-of-ways to utilities has brought in more revenue than it costs to operate and maintain the trail each year.

Some other benefits of the trail are in connecting parks and community centers to neighborhoods. We have ten such parks or community centers along the W&OD, and the trail also provides a safe place for people to ride or hike or just walk away from our crowded, hazardous highways, which are just getting worse.

Just being discovered is the use of the W&OD trail as a commuter route, and the W&OD runs near four of the Orange Line Metro stops, so it is starting to be used as a commuter route.

But the best thing about a trail like the W&OD is just the fact that thousands of people every day can get out and use the trail without paying a fee and without making reservations or driving a long way to get there. They can just go out and have fun using it.

Thank you.

[The prepared statement of Mr. McCray follows:]

Northern Virginia
Regional Park Authority
Created under the Virginia Park Authorities Act
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DARRELL G. WINSLOW
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Capital Programs Director

TESTIMONY OF PAUL MCCRAY, NORTHERN VIRGINIA REGIONAL PARK AUTHORITY BEFORE THE SENATE COMMITTEE ON ENERGY AND NATURAL RESOURCES, SUBCOMMITTEE ON PUBLIC LANDS NATURAL RESOURCES ON THE BILL NUMBER S 1544.

March 3, 1988

Subcommittee on Public Lands
National Parks and Forests
Senate Committee on Energy and Natural Resource
Senate Dirksen, 308
Washington, D.C. 20510-6150

Mr. Chairman:

My name is Paul McCray. It is a pleasure to testify before you on behalf of the Northern Virginia Regional Park Authority. We believe that this bill is extremely important to everyone.

Converting an abandoned railroad right-of-way to a multi-use trail can provide many unique opportunities and benefits to a community. The Washington and Old Dominion Railroad Regional Park trail is an excellent example.

The W&OD trail is a 44-mile long trail, running from the City of Alexandria, Virginia, to the Town of Purcellville in Loudoun County, Virginia. The trail passes through or near three counties, two cities, five towns and many communities. When all improvements are finished later this year, we will have 44 miles of paved trail and 31 miles of graveled horse/jogging trail. We estimate that the trail is used by over 1 million hikers, cyclists, horseback riders, joggers, skateboarders and cross country skiers.

The most important benefit of the W&OD trail is as a recreational outlet for the many people of Northern Virginia. Whether they choose a leisurely stroll or a 30 mile bike ride, all are free to use the W&OD in the manner they prefer. The trail brings park land and recreational opportunities to communities and business districts where none previously

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existed. Lunch hours are the busiest time during the week on the W&OD trail as office workers escape the stress of their jobs.

Another major plus of a trail such as the W&OD is the health benefit. People who would otherwise just sit around are out walking, jogging and cycling. Everyone who uses the W&OD experiences some level of exercise, which in the long run can only improve their health and physical condition. Rails to trails conversions are especially beneficial because the flat grade required by trains provides a trail that people of all conditions and circumstances can easily use.

The economic benefits of a rail-trail are not always easy to see, but there is evidence of a positive impact along the W&OD trail in Northern Virginia. Homes for sale along the W&OD now have "For Sale" signs in the backyard next to the trail as well as in front by the road. We have even seen real estate advertisements boasting of the property's prime location next to the W&OD trail. If proximity to the trail becomes a selling and buying point, then it should have a positive effect on land values.

Businesses located near the trail also have been affected by the large numbers of people using the W&OD. One owner of a general store reports that his weekend business doubles during good weather due to trail traffic. A convenience store manager complained to us once that he could not hire enough employees to handle the trail business on weekends.

There is an economic on the operation of the trail also. It is always a concern that a rail to trail conversion might be a financial drain on the agency charged with its operation. This is no longer a problem on the W&OD trail. Rentals of park property along the trail to businesses and leasing rights-of-way to utilities have brought in more income then is necessary for operations and maintenance.

Many other benefits are derived from the W&OD trail. It directly connects ten other parks and community centers, with more planned in areas now being developed. The trail also provides a safe place to walk or ride bicycles, away from the hazards of our crowded roads.

A use that is just being discovered is the W&OD as a bicycle commuter route. It runs within a mile or less of four Orange line Metro stops and connects with other trail systems to allow direct access to Washington, D.C. But the best thing about the W&OD trail is that it's a place where thousands of people a day can go to have fun and relax without having to pay a fee, as well as without having to hassle getting there.

Senator **Metzenbaum**. Thank you.

I want to say to you, Mr. McCray, that I think you have a magnificent trail, and I think it is beautiful both to ride on and run on. I think it is a safe trail, although my poor wife had a bad accident on it, but I do not blame the trail for her accident.

But she still would agree that it is a great trail in spite of the accident that she had.

You are from Mansfield, OH? No, excuse me, Mr. McKee is from Mansfield.

Thank you very much, Mr. McCray. We appreciate your support.

Steven McKee, Director of the Gorman Nature Center, Mansfield, OH.

STATEMENT OF STEVEN M. McKEE, DIRECTOR, GORMAN NATURE CENTER, MANSFIELD, OH

Mr. **McKee**. Thank you, Mr. Chairman and members of the subcommittee.

My name is Steve McKee, and I am Director of the Gorman Nature Center in the Richland County Park District in Mansfield, Ohio, and we support S. 1544.

Mr. Chairman, you have made it clear to us today that trails are extremely attractive and popular public recreation and conservation facilities. It seems that most of these are operated by local governments, State and local governments. But even with strong local support, there are many difficulties in creating a trail.

Because trails are important, important enough for Congress to wisely pass the National Trails System Act, it is clearly appropriate for Congress to take reasonable steps to address some of the problems relating to trail creation. And that is why we are so excited about this S. 1544 bill, because it has the potential of creating new trails, and also, I feel that it is designed to be deficit neutral, too, which I appreciate.

Richland County is very interested in establishing a recreational trail on 17 miles of railroad right-of-way belonging to the B&O Railroad, now the CSX Corp. The ICC authorized the discontinuance of service to this line, and we quickly recognized the recreation and the commuter potential of this corridor. Unfortunately, we ran into a number of problems acquiring this right-of-way, which is why my testimony is pertinent today.

First, we had to scramble to come up with a source of funds. And I say scramble because counties generally lack sufficient advance notice to plan ahead for the purchase of a rail corridor. Under ICC regulations, we had but a few weeks to commit to this project before the rail carrier had the right to sell part of the corridor to adjacent land owners or to tear out bridges and culverts that would be valuable for trail purposes.

Fortunately for us, the CSX Corp. was understanding in this regard and supported extensions of time before the ICC, which has allowed us to go to the Ohio Department of Transportation and the Federal Highway Administration for funding.

Nevertheless, many are not so fortunate, and the revolving fund which S. 1544 would establish would be an invaluable tool for State and local recreation departments seeking quickly available funds to acquire trails. Speaking from experience, we therefore wholeheartedly endorse the creation of the revolving fund for these acquisitions.

The second major problem which we encountered is not addressed by this bill, but I think it should be addressed by amendment. We were willing to purchase all the corridor from the CSX Corp., all that they owned in fee, at full appraised value. However, the railroad wanted approximately five times this amount and refused to deal further. As a result, we are now in a potentially costly and prolonged eminent domain action. There is much that could and should be done at the Federal level about this problem.

Mr. Chairman, when a railroad line is approved for abandonment by the ICC, a private party interested in acquiring the line can request that the ICC compel the transfer of the line and ask them also to set terms and conditions for the sale under U.S.C. 10905. But this privilege is not extended to public agencies seeking to acquire similarly abandoned corridors. We think that Congress intended public agencies to be treated in a comparable fashion under statutes like Section 8(d) of National Trails System Act.

On its face, section 8(d) says that the ICC can authorize abandonment but not before allowing private groups to seek the creation of a trail.

The ICC, on the other hand, takes the position that they do not have the authority to force the sale or even to set terms and conditions. Why should a public agency such as ourselves, seeking a corridor for public use, be given virtually no ICC remedy while the private parties seeking the corridor for private gain may be able to compel a transfer at what ICC determines to be fair market value. Such a regime only penalizes State and local taxpayers like us. A transfer for alternative public use with adequate compensation is no more of a burden on the rail industry than transfer for private gain.

Moreover, preserving corridors for railbanking and future use would serve the important Federal transportation policy interests as well as recreational ends.

We therefore suggest you further improve the Trails Act with amendments to existing Section 8(d) to provide that ICC has authority and that they know they have the authority to set any disputed terms and conditions on a rail-to-trail conversion.

I appreciate you letting me testify today, and I look forward to cooperating with the subcommittee.

[The prepared statement of Mr. McKee follows:]

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GORMAN NATURE CENTER

Testimony
before the Public Lands, National Parks and Forests Subcommittee
of the
Senate Energy and Natural Resources Committee
Steven M. McKee
Director, Gorman Nature Center
Executive Director, Richland County Park District
Richland County, Ohio

March 3, 1988

S. 1544, Trails System Improvements Act

Mr. Chairman and members of the Subcommittee, my name is Steve McKee. I am the Director of the Gorman Nature Center and the Executive Director of the Richland County Recreation and Park District. We support S. 1544.

Mr. Chairman, it is freely admitted that trails are extremely attractive and popular public recreational and conservation facilities. Similarly, it is clear that many aspects of trails are inherently local in nature. Put another way, trails are generally only successful if they enjoy the support of their host states or counties. But even with strong local support, there are many difficulties in creating a trail. Some of these difficulties involve problems with current federal statutes and regulations, or are otherwise amenable to at least a partly federal solution. Because trails are important, it is clearly appropriate for Congress to take reasonable steps to address some of the problems relating to trail creation which can be helpfully dealt with at the federal level.

Richland County is very interested in establishing a recreational trail on 17 miles of railroad right-of-way for which Baltimore & Ohio Railroad (a unit of CSX Corporation) received authority from the Interstate Commerce Commission (ICC) to discontinue service about a year ago. Railroad rights-of-way are generally very attractive for trail purposes because they are already assembled corridors which follow a gentle grade and are ideal for a number of recreational acitivities. This 17 miler running south from Mansfield is an excellent example. Unfortunately, we ran into a number of problems in acquiring this right-of-way.

First, we had to scramble to come up with a source of funds. I say scramble because Counties generally lack sufficient advance notice to plan ahead for the purchase of a rail corridor, and there is no assurance that we can get the necessary approvals and obtain the necessary funds in the short period of time available under ICC regulations before the rail carrier sells parts of the corridor to adjacent landowners or tears out bridges and culverts valuable for trail purposes. Fortunately for us, CSX Corporation was understanding in this regard and supported extensions of time before the ICC which allowed us to go to the Ohio Department of Transportation and the Federal Highway Administration for funding. Nevertheless, many are not so fortunate and the revolving fund which S. 1544 would establish would be an invaluable tool for state and local recreation departments seeking quickly available funds to acquire rail trails. Speaking from experience, we therefore wholeheartedly indorse the creation of a revolving fund for these acquisitions.

The second major problem which we encountered is not addressed by this bill. As it turned out, the Ohio Department of Transportation and the Federal Highway Administration were willing to purchase all the corridor which CSX owned in fee at the full appraised value. However, the railroad wanted approximately five times this amount and refused to deal further. As a result, we are now in a potentially costly and prolonged eminent domain action. There is much that could and should be done at the federal level about this problem.

Mr. Chairman, when a railroad line is approved for abandonment by the federal ICC, a private party interested in acquiring the line to provide private rail service can request the federal agency to compel the transfer of the line to the private requester, and to establish all disputed terms and conditions. Under this regime, which is codified at 49 U.S.C. 10905, the ICC does not require the acquiring party to pay more for the corridor than the appraised value of what the railroad owns in fee simple title plus the "salvage value" of any ties and tracks transferred.

We think that Congress intended public agencies to be treated in a comparable fashion under statutes like 49 U.S.C. 10906 and section 8(d) of the National Trails System Act, 16 U.S.C. 1247(d). Indeed, what is now § 10906 was added to the statutes to confirm the authority ICC exercised in the so-called Kenmore case, in which ICC did impose an arbitration remedy to resolve any disputed terms and conditions and to compel a transfer of a right-of-way which is now Seattle's famous Burke-Gilman Trail. Section 8(d) on its face says ICC cannot authorize an abandonment but must order a transfer for railbanking and interim trail use on terms which the agency sets when a party such as ourselves agrees to pick up future corridor costs.

ICC, however, takes the position not only that it will not require a transfer to a public agency for public use and that it will not set terms and conditions but also that it lacks statutory authority to do so. Why should a public agency, such as ourselves, seeking a corridor for public use be given virtually no ICC remedy, while a private party seeking the corridor for private gain be able to compel a transfer at what ICC determines the minimum price required to avoid a "takings" question under the Constitution? Such a regime only penalizes state and local taxpayers. A transfer for alternative public use with adequate compensation is no more of a burden on the rail industry than a transfer for private gain. Moreover, preserving the corridors for railbanking and future use would serve important federal transportation policy interests, as well as recreational ends.

We therefore suggest that you further improve the Trails Act with amendments to existing sections 8(d) or perhaps 9(b) to provide that ICC has authority, upon request of an interested party, to establish any disputed terms and conditions of transfer to a state or local government or qualified private organization for alternative public use, including recreational trail use. That would have helped us, and it still might, and it certainly will help others in the future. Unless something like this is done, many excellent trail opportunities will continue to be lost.

Mr. Chairman, I appreciate this opportunity to testify on behalf of Richland County and I look forward to cooperating with the Subcommittee in the future. Thank you.

Senator **METZENBAUM**. Thank you very much, Mr. Mckee. We appreciate your being here with us today.

Derrick Crandall, President, American Recreation Coalition.

STATEMENT OF DERRICK A. CRANDALL, PRESIDENT, AMERICAN RECREATION COALITION

Mr. **CRANDALL**. Thank you, Senator. I am delighted to be here today and delighted to share the platform here with somebody who manages a centerfold.

As you may know, in the Executive Summary of the President's Commission on Americans outdoors, we specifically talk about the Western and Old Dominion Trail and have a picture of it here, so it certainly is easy for us to relate to the wonders of that trail and to the trails that you have experienced in Ohio and the trails that many of us have experienced around the country.

We simply want to underscore today the importance that President's Commission on Americans Outdoors placed upon linear corridors. We believe that this nation is rich in a legacy of National Forests and National Parks, of wild and scenic rivers and wilderness areas, and it is our opportunity now in the 1980's to build upon this legacy with the concept of greenways, and recreational trails are clearly a major part of that greenway vision that the Commission spoke to, and hopefully provide some pictures that will help to move that vision into reality.

Trails have long been an important element of the outdoors for Americans, but the volume and the diversity of use of trails has exploded since 1960. Americans today enjoy trails for traditional purposes such as wildlife viewing and hunting, accessing back country campsites and quiet overlooks, and we use it for exercise as joggers and as walkers. We use it to ride our horses and our bicycles, our snowmobiles and our off-road vehicles as well as skiing on trails and using roller skates and skateboards.

Unfortunately, the growth in the demand for trails has now been a major priority for this Nation at any level. We have added more people using trails in more ways, and the result has been social safety and environmental conflicts.

We have also lost trails to conversion of urban and near urban development, housing tracts, commercial establishments and a variety of others. We have had budget problems which have further whittled away the available trail supply.

What we need today is an aggressive effort to build a bigger pie, a larger trail system which provides adequate quality opportunities for all Americans in the full range of trail interests. To create this bigger pie, it is clear that Americans need new tools, including those which you have proposed in S. 1544.

We also think there are other tools, and we look forward to talking with you about a concept for a national recreational trust fund, national recreation trails trust fund that would be able to tap into the more than $80 million that are now paid in Federal gas tax receipts for fuel used in snowmobiles and motorcycles, all-terrain vehicles and a variety of other powered recreational devices which we think should be put more to recreational trail purposes, much as

Federal motorboat gasoline taxes now go to benefit fishing and boating activities.

In conclusion, we thank you in particular, and this committee, for the attention that you are giving to the importance recreation trails play in our lives today, and to the even greater importance of adding trails for Americans today and tomorrow. Increases in the numbers of railroad abandonments that are converted to recreational trails are important, and we need to pursue this aggressively.

Thank you.

[The prepared statement of Mr. Crandall follows:]

STATEMENT BY DERRICK A. CRANDALL, PRESIDENT OF THE AMERICAN RECREATION COALITION, BEFORE THE UNITED STATES SENATE COMMITTEE ON ENERGY AND NATURAL RESOURCES REGARDING S.1544, AMENDING THE NATIONAL TRAIL SYSTEM ACT. (MARCH 3, 1988)

Mr. Chairman and distinguished Members, I am Derrick Crandall and I am delighted to appear here today to offer my support for S.1544, amending the National Trail System Act. I am appearing today as a member of the President's Commission on Americans Outdoors as well as in my capacity as President of the American Recreation Coalition, a national federation of associations and companies with an active interest in the recreation opportunities open to Americans.

I applaud Senator Metzenbaum's action to take advantage of a unique opportunity to enrich American's recreation legacy by expanding our network of recreation trails. As my friend and colleague Stu Northrop discusses in his testimony, Americans have dramatically increased their participation in trail activities. Accommodating this expansion has proven difficult, especially in urban areas where linear blocks of undeveloped land are rare. Yet where they exist, we see both tremendous popularity and a remarkable ability to magnify the worth of existing recreation areas by linking them together with a trail.

The President's Commission placed the highest priority on steps to expand our linear recreation areas, including trails, under the concept of greenways. Successful community-based greenway networks can link where people live, work and play while also offering aesthetic, environmental and wildlife benefits. Greenways can also help integrate the bevy of public and private recreation providers at work within each community, bringing about the cooperation and partnership our report stressed would be needed to meet America's outdoor needs in the next century.

The legislation proposed by Senator Metzenbaum and others can be an important tool in expanding our networks of greenways. It would assert the public's right to abandoned railroad rights-of-way across the nation which, when originally established, contained reversionary clauses which called for federal ownership upon abandonment. The legislation provides for recreational use of these corridors wherever feasible. If, however, the corridor is judged unsuitable for recreational purposes, then the proceeds from the sale of the corridor are to be placed in a special revolving fund providing loans to aid states, counties and local communities in acquiring trail corridors.

Trails have long been an important element of the outdoors for Americans, but the volume and diversity of trail usage has exploded since 1960. Americans enjoy trails today for traditional purposes such as wildlife viewing and hunting, accessing backcountry campsites and quiet overlooks. We also use trails for exercise as joggers and walkers. We use trails to ride our horses and our bicycles, our snowmobiles and our ORV's. We ski on trails and roller skate on trails.

Unfortunately, the growth in our use and enjoyment of trails has not been matched by growth in the nation's trail network. For more than two decades, we have added more people using trails in more ways to our existing trail network. The result has been social, safety and environmental conflicts. Conversion of open land to developed uses in and near our urban areas and budgetary pressures on public land agencies have combined to whittle away at the supply of recreational trails, probably more than offsetting efforts to develop new trails along abandoned railroad rights-of-way and other available corridors.

This nation's trail enthusiasts need a "bigger pie" -- a trail system which provides adequate, quality opportunities for the full range of trail interests today and tomorrow. The "bigger pie" will allow each trail interest to have the slice of the trail network it needs without robbing another trail interest.

To create the "bigger pie," America's trails need new "tools", including those proposed by S. 1544. With dependable funding for corridor acquisition, development and operation, a forum which draws together all trail interests and appropriate public agencies, and lots of local energies, Americans of this generation can add an important element to the rich legacy of parks, forests and refuges we now enjoy, thanks to the vision of earlier Americans.

The Congress will soon receive a proposal from the nation's major trail interests to provide an additional, new "tool" for trails which would complement those created under S. 1544. Americans who enjoy motorized recreational trail activities generate an estimated $83.5 million in fuel taxes annually as they operate snowmobiles, motorcycles and ATV's. The fuel tax they pay now goes to construct highways from which these vehicles are barred. Faced with a similar dilemma affecting the nation's boaters in 1984, the U.S. Congress transferred federal motorboat fuel to the Aquatic Resources Trust Fund, commonly known as the Wallop-Breaux Fund. This money is now regularly returned, through matching grants to the states, to improve boating and fishing opportunities. The program enjoys broad support among conservationists, recreationists and the Congress for its effectiveness and efficiency. Federal gas tax derived from motorized trail activities should be treated similarly, we feel, with the monies benefiting trails for all, motorized and non-motorized through a federal grant program to states.

With some money to develop new trails, a number of options arise. First, we can work to add trails close to people. These trails can be "opportunistic." In some cases, they can utilize existing corridors used for utilities and highways. In other cases, they can be developed as open spaces are converted to housing and offices, schools and stores through local land use planning efforts. Trails can be developed on privately-owned lands, with owners consent, in return for current use property taxation and/or assistance in controlling trespass and liability.

Some of the funds can also be used on public lands. The nation's forest system now contains approximately 100,000 miles of trails. Most of this network was not constructed to maximize recreational experiences, however. Instead, these trails were initially constructed for fire control purposes, or for access to ranger cabins, or other purposes. It is possible, according to knowledgeable Forest Service sources, to double the trail mileage in the national forests with trail designed to accommodate different recreational activities -- zoning by design.

In conclusion, Mr. Chairman, we thank this committee for its attention to the importance recreational trails play in our lives, and to the importance of adding trails for Americans today and tomorrow. We urge enactment of S. 1544 and your early consideration of additional new trail tools as they are proposed.

Thank you.

Derrick A. Crandall
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Senator **Metzenbaum**. Thank you very much, Mr. Crandall.

Now we have Mr. Stuart Northrop of the Huffy Corp., Dayton, OH, Chairman of the Executive Committee.

We are happy to have you with us.

STATEMENT OF STUART J. NORTHROP, CHAIRMAN, EXECUTIVE COMMITTEE, HUFFY CORP., DAYTON, OH

Mr. **Northrop**. Senator, nice to be here.

It is a pleasure to appear here on behalf of your bill and in support of it.

In my brief testimony I would just simply like to relate to you a little of the information on linear recreation that was brought to the attention of the President's Commission on Americans Outdoors, on which I had the pleasure of serving.

Traditionally, recreation has been thought of as occurring on some confined plot of ground, and what was brought dramatically to our attention on the Commission is the nature, the linear nature of so much of recreation today, and how those major linear recreation activities are growing.

I have listed in my written testimony these, but clearly the participation in them, such as walking and driving and bicycling and jogging and running, where the participation figures are 53 percent of all American adult population, are really dramatic figures and indicate the diversity of the interests in this linear form of recreation, and the diversity of it.

I would also like to stress that those figures are for the adult population, that if you were to include children, for instance, in bicycling, where nearly every child in America bicycles, you included children in the study, then the percentage of participation figures would be even higher.

But your bill and the Trail bill you should keep in mind is reaching a tremendous number of people of all ages. And that this group with the interest in linear recreation is growing is also very important. Twenty-five years ago, when the Rockefeller Commission on Outdoor Recreation reported figures on bicycling, in 1960, only 9 percent of American adults were participating in bicycling, and that has continued to grow since then.

Senator, when we built our plant in Salina, OH in the late 1950's, we produced 1000 bicycles a day, that is about 200,000 a year, and less than 10 percent of them were sold to adults. Today, in Salina, OH, where we produce all of our Huffy bicycles, we are producing 15,000 bicycles a day, that is, 3 million bicycles a year, and 30 percent of them are being sold to adults.

The fastest growing segment of the bicycle business is the trail bikes, which have captured 15 percent of the market. So the point is that these activities are really dramatic growth areas in recreation, and they require a linear passage, and that linear passage is becoming more and more difficult to obtain.

The reason for this growth was made clear in the President's Commission's report, and I do not need to repeat all of them, but I would like to summarize them in one sentence. Americans of all ages love the great outdoors in this country, and they want to experience it in an increasing diversity of recreational activity.

As I see it, this is what your Senate bill 1544 is all about, providing Americans with opportunities to enjoy the great American outdoors in a way that they choose. More and more of them are choosing linear activities, and these activities require that linear passage, that linear corridor.

I stress Americans of all ages because we have an aging population, and it is the linear activities, the walking and the bicycling and the hiking and the backpacking that appeal to so many people, both the young and the old, and attributes to a major factor for that growth.

The President's Commission really presented a challenge to the people of this country, lead your community to create the kind of recreational opportunity that you want. Communities across this country are rising to that challenge.

You mentioned the Little Miami River, and I had the pleasure of addressing their 25th anniversary dinner not too long ago, and that is a great nonprofit organization, and you know the fine work they have done in Ohio, and they need this kind of help, and your reaching out to try to help them in this way is so important for a nonprofit organization that is working primarily with private funds, and they need this kind of help.

I see in this proposed legislation the kind of help that they and communities throughout this country are seeking. I think that it will provide great stimulus for local initiatives, and to do it without new Federal expenditures. In my opinion, the bill places the responsibility for the initiatives and for the implementation where they should be placed, on the local communities, while at the same time loaning them funds which the bill generates from the unused Federal assets on an attractive basis to help the local communities obtain their goal.

In the President's Commission report we talked about the need for new, imaginative partnerships if the needs of Americans for recreational opportunities close to home were to be met. This legislation proposes one of the kinds of Federal partnerships with local communities across the country that we on the Commission had in mind.

On behalf of my fellow Commissioners, but more importantly, on behalf of Americans who love the outdoors and want the opportunity to experience it all during their lifetime, I thank you for the concepts in this bill, and I urge you to work for its enactment.

Thank you, Senator.

[The prepared statement of Mr. Northrop follows:]

S.1544 - A BILL TO AMEND THE NATIONAL TRAILS SYSTEM ACT

TESTIMONY - STUART J. NORTHROP
March 3, 1988

Chairman - Executive Committee
HUFFY CORPORATION
DAYTON, OHIO

It is a pleasure to appear before you on behalf of the recreationists of this country in support of S.1544.

In my brief testimony I would like to relate to you a little of the information on linear recreation that was brought to the attention of the President's Commission on Americans Outdoors on which I had the pleasure of serving. Traditionally recreation has been thought of as occurring on some confined plot of ground. What was stressed to us on the Commission was that many of the faster growing recreational activities are linear in nature.

I would like to list the major linear recreational activities for you, merely to give you some sense of their diversity and the high degree of participation. This is 1982 data and the percentages refer to that percentage of the adult U.S. population that participates in that activity.

Walking	53%
Driving	48%
Bicycling	32%
Running/Jogging	26%
Hiking	14%
Off-Road/Snowmobiles	14%
Horseback Riding	9%
Canoe/Kayak/Rafting	8%
Backpacking	5%
Cross-Country Skiing	3%

I would like to stress that these percentages are of the adult population. For example, if children were included the figure for bicycling, and many of the others, would be significantly higher, because almost 100% of all children ride a bike.

I would also like to stress that these linear recreational activities are growing. Twenty five years ago the Rockefeller Commission on Outdoor Recreation reported figures for 1960 where adult participation in bicycling was a mere 9%. Adult participation in these activities has grown and is continuing to grow. The current high growth of mountain (trail) bikes is just one example of that continuing growth and continuing diversity.

The reasons for this growth are made clear in the President's Commission Report. They are many, but I would like to summarize them by simply saying, "Americans of all ages love the Great Outdoors in this country and they want to experience it in an increasing diversity of recreational activities." As I see it that is what this Senate Bill 1544 is all about. Providing Americans with opportunities to enjoy the Great American Outdoors in a way that they choose. More and more of them are choosing linear activities and these activities require linear passage across the land. The passage is becoming more and more difficult to obtain.

I said "Americans of all ages". That is important. One of the reasons that linear recreation may be growing faster than other recreational activities is that these, in particular, appeal to all ages and especially to our identified 'aging population'. Walking, hiking, bicycling, backpacking, etc. are clearly for participants of all age groups and they also require minimum investment and thus are for participants of all levels of economic means.

But they do require access to a linear passageway -- a trail or path or lane. And it was made clear to the President's Commission that Americans want to do a majority of their recreational pursuits close to home. For most Americans that means close to the cities and towns of the country.

So the President's Commission presented a challenge to the people of this country: lead your community to create the kind of recreational opportunity that you want. Communities across this country are rising to that challenge. But they need assistance. I see in this proposed legislation the kind of help that they are seeking. I think that it would provide great stimulus for local initiatives and do it without new federal expenditures. In my opinion the bill places the responsibility for the initiatives and the implementation where they should be placed: on the local communities, while, at the same time, loaning them funds (which the bill generates from unused federal assets) on an attractive basis, to help the local communities attain their goals.

In the President's Commission Report we talked about the need for new, imaginative partnerships if the needs of Americans for recreational opportunities close to home were to be met. This legislation proposes one of the kinds of federal partnerships with local communities across this country that we had in mind. On behalf of my fellow Commissioners, but more importantly on behalf of the Americans who love the outdoors and want the opportunity to experience it all during their lifetime, I thank you for the concepts in this bill and I urge you to work for its enactment.

Senator **Metzenbaum**. Thank you very much, Mr. Northrop.

Mr. Northrop, tell me, what is a trail bike?

Mr. **Northrop**. A trail bike is a bike that has been built really for off-road use. It has a stronger frame, it has got straight up handlebars and a larger saddle. It has usually 15 or 18 gears so that you get low speeds for rougher terrain, and it has really been designed for riding trails.

It can be used on regular bikeways, paved bikeways, and it is very great. A lot of people prefer sitting up straight to the 10-speed where they have what we call the Maze handlebar where they leaned over. And particularly older people prefer the straight up bike. But many younger people now are enjoying the ruggedness of the trail bike and using it on trails throughout this country.

Senator **Metzenbaum**. Thank you very much.

I have a 10-speed, but I did not know what a trail bike was.

Mr. David Burwell, President of the Rails-to-Trails Conservancy, Washington, DC.

STATEMENT OF DAVID G. BURWELL, PRESIDENT, RAILS-TO-TRAILS CONSERVANCY

Mr. **Burwell**. Thank you, Mr. Chairman.

My name is David Burwell, and I am President of the Rails-to-Trails Conservancy, which is a nonprofit, nationwide conservation organization dedicated to the preservation of abandoned and about-to-be-abandoned rail corridors for recreation, conservation and historic preservation.

In preparation for this hearing, we prepared a map of all the existing and in process of conversion rail-trail projects in the United States. There are about 150 rail-trails in existence, and an equal number in the process of conversion, and I think it indicates the support this concept has throughout the country, and we would like this map to be made a part of the record, if you do not mind.

Senator **Metzenbaum**. Without objection, it will be.

Mr. **Burwell**. The President's Commission on Americans Outdoors, in its final report, stated unequivocally that, and I quote, "thousands of miles of abandoned rail lines should become hiking, biking and bridle paths." Two Senators on this committee were members of that commission, Senators Johnson and Wallop, and we appreciate Senator Johnston being a cosponsor of this bill, and we hope that this—I think it is very appropriate that this legislation be considered by this committee.

I would like to talk just briefly about the benefits of rail-trails. In the West, the rail corridors were laid down before the land was settled. As a result, the rights-of-way, which are fenced, have sometimes the only remaining remnants of the original prairie habitat, and these corridors, besides providing public access, are extremely valuable from an ecological standpoint.

They also follow the traditional migration routes, the Oregon Trail, the Santa Fe Trail, the Mormon Trail, the Lewis and Clark Trail, and as these corridors are abandoned for rail use, we have the opportunity to actually create a system of historic national trails of tremendous proportion, and it should not be lost.

In the East, the railroads were often built right on top of the pre-existing canal system. We used to have a tremendous system of canals in the United States. The railroads were actually built in the canal beds, and as the rail corridors are abandoned, we have the opportunity to create an amenity like the C&O Canal Park here in Washington, DC, throughout the East. It is an absolutely tremendous resource. The corridors mostly are built along streambeds, too, and riverbeds, so it is very high quality habitat.

Nationwide, we built about 292,000 miles of steam and electric railroads in the United States. We are now at about 140,000 miles, so we have abandoned already about 50 percent of our corridors, and we are fading fast. There is going to be maybe a 100,000 mile core system by the year 2000.

S. 1544 addresses a subset of these corridors, about 30,000 miles of federally granted railroad rights-of-way, rights-of-way that were granted over federally owned property. What this bill does, in a nutshell, is stops a giveaway of a very valuable Federal asset.

Back in 1922, Congress passed a law giving away the Federal interest in these corridors upon abandonment for railroad use, thinking that they were not, these corridors were not very valuable. Now we know absolutely that they are very valuable. Congress has stated unequivocally that it is national policy to preserve our national built rail system, and therefore, it is appropriate prospectively to void the giveaway and recapture this interest for the Federal Government.

The previous witnesses, the administration witnesses, would like us to delay enactment until the legal issues regarding the title to federally granted rights-of-way are cleared up. With all due respect to the administration, Senator, this I think would have all the effect of rearranging the deck chairs on the *Titanic*.

These corridors are being lost on a daily basis, and we cannot wait until the exact nature of these interests are absolutely crystal clear or we will have nothing left to save.

I would like to quote from just one legal opinion, *State of Idaho* v. *The Oregon Short Line Railroad Company,* which can be found at 617 F. Supp 207, an Idaho case. Judge Callister there, in addressing the nature of the Federal interest in these federally granted corridors, said, and I quote:

> The precise nature of that retained interest need not be shoehorned into any specific category cognizable under the rules of real property law. Regardless of the precise nature of the interest, Congress clearly believed that it had authority over 1875 Act railroad rights-of-way. Sections 912, 913 and 316, which address these corridors, evince an intent to ensure that railroad rights-of-way would continue to be used for public transportation purposes.

And this is exactly what this bill does, Senator. It seeks to preserve these corridors for public recreation.

The bottom line is that Congress did give an easement for transportation purposes, and it has the power to redefine that easement as long as that easement exists. It has done that in section 913 of title 43 where it said a federally granted right-of-way for railroads can be changed to an easement for a public highway, and that easement will continue even after abandonment of the corridor for railroad use.

So Congress does retain that interest, and this bill simply redefines that interest to say when you do not need it for railroads anymore, we are going to take it back, we are going to make trails and greenlands out of it.

Funding is also critical, Senator. The cost of building new trails is very high. The Georgetown Spur that was referred to by Director Mott, it is an 11-mile corridor. The value of that corridor is, depending on whether you talk to the Park Service or the railroad, is somewhere between $15 and $80 million.

We need new funding, and the small amount of Federal funding that is needed to get this pump primed and get this program started, about $1 million, is insignificant compared to the millions, maybe hundreds of millions of dollars that could be reaped by recapturing this Federal interest.

This Federal Government is not doing enough now to preserve the Federal interest in these corridors. The Park Service is trying to help, but it has no budget to do it. The Interstate Commerce Commission, frankly, is not trying to help. It seems absolutely uninterested in what happens to these corridors after abandonment for rail use. If anything is going to happen to preserve these corridors, it will have to be by this committee.

Thank you very much.

I would like to just quote again from the Commission, the President's Commission on Americans Outdoors, in its final report, when it said imagine every person in the United States being within easy walking distance of a greenway that could lead around the entire nation. It can be done if we act soon.

S. 1544 is a firm step towards implementation of this vision, and we strongly urge its enactment.

Thank you.

[The prepared statement of Mr. Burwell follows:]

RAILS
-TO-
TRAILS
CONSERVANCY

Statement of David G. Burwell, President
Rails-to-Trails Conservancy
Before the
Committee on Energy and Natural Resources
Subcommittee on Public Lands

S.1544
National Trails System Improvement Act

March 3, 1988

Mr. Chairman, my name is David Burwell. I am President of the Rails-to-Trails Conservancy, a non-profit, nationwide conservation organization dedicated to the preservation of abandoned and about-to-be-abandoned rail corridor for recreation, conservation and historic preservation purposes. Conversion of these corridors, where suitable, to trail use significantly contributes to our nationwide trail system. We support S. 1544.

The Benefits of Rail-Trails

Railroad corridors have specific characteristics that commend their preservation for continued public use upon termination of rail service:

- Linear corridors are needed for recreation. A survey conducted by the President's Commission on Americans Outdoors, on which both Senator Johnston and Senator Wallop of this committee served, found that the number one new facility need of state and local recreation and park directors was for "trails and trail-related facilities."

- Rail corridors serve national conservation objectives. Railroads tend to follow traditional migration routes and low-lying areas along rivers. These riverine corridors provide stream access for anglers, high quality habitat for wildlife, and buffer zones for soil erosion control. In the prairies of the midwest rail corridors often contain the only remaining remnants of the original prairie ecosystem, since rail corridors have never been plowed.

- Rail corridors have historic value. In the west, railroads were constructed along several of our designated national historic trails such as the Lewis and Clark Trail, the Oregon Trail, and the Santa Fe Trail. When abandoned, these rights-of-way could serve modern-day pioneers wishing to trace these historic routes. In the east, railroads were often constructed within our pre-existing national canal system and, upon abandonment, provide an opportunity to recapture a piece of our early history. One need only take a walk along the C&O Canal Trail here in the Washington, D.C. metropolitan area to understand the contribution such canal trails can make as urban amenities.

I could go on, but I will stop here. I come not to praise rail-trails but to build them. S. 1544 is a strong step towards this goal.

The Amount of Federal Land at Issue

The federal government played a leading role in the construction of our national rail system through charters, land grants, cash subsidies, low-interest loans and loan guarantees, and grants of rights-of-way over federal land. S. 1544 addresses this last form of support: railroad rights-of-way granted over federal land. According to a study conducted by the Interstate Commerce Commission in 1932, the federal government granted rights-of-way over approximately 628,000 acres of federal land between 1853 and 1916, most of it west of the Mississippi (appendix A).[1] At an average width of 150-200 feet, this represents over 30,000 miles of federally-granted rail corridor.

The documentary basis for the ICC study still exists, so it is possible to precisely locate these federally-granted corridors. In preparation for this hearing, RTC staff researched these documents and found that 417,000 acres were received by just four railroads, the Southern Pacific (135,769), the Atchison, Topeka and Santa Fe (48,484), the Union Pacific (135,745) and the Northern Pacific (now the Burlington Northern) (97,406). Maps showing the federally-granted corridors of two of these railroads, and a partial state-by-state breakdown, are attached (appendix B). According to the ICC study, the value of federally-granted railroad rights-of-way as of December 31, 1927 was $68,492,627.

The Interest of the Railroads and the United States

Before 1871, railroads received rights-of-way over federal land by specific act of Congress, and these are generally thought to be held in "limited fee" or "fee simple determinable," meaning that the railroad owned rights to the corridor so long as the corridor remained in rail use. In 1903 the U.S. Supreme Court held that, upon abandonment, ownership of these corridors reverted to the federal government upon abandonment for railroad purposes.[2] In 1875, Congress enacted the General Railroad Right-of-Way Act of 1875, granting railroads the right to locate lines virtually anywhere on federal land by simply filing a map with the Bureau of Land Management. This law, which has never been repealed, has been generally viewed as granting railroads a transportation right-of-way regulated by the federal government.[3] Nevertheless, railroads retained some interest in the subsurface of 1875 rights-of-way, such as the exclusive right to lease such lands for oil and gas under the Right-of-Way Leasing Act of 1930. 30 U.S.C. 301.

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[1] This table is from Public Aids to Transportation, Vol. II Railroads, at 118.

Stopping a Federal Giveaway

Under existing law the federal government gives away whatever interest it retains in these federally-granted corridors upon abandonment for rail use. S. 1544 amends existing law to recapture the federal interest, upon abandonment, for continued public use of these corridors. Our point here is not to debate the precise nature of this retained federal interest. Rather, it is to point out the obvious fact that it serves no public purpose to give away this interest and allow these corridors to be destroyed.

The federal government did not undertake this giveaway policy in furtherance of any higher public purpose. It simply didn't think these corridors were worth the time and effort to manage. Therefore, although it retained both surface and subsurface reversionary rights on many if not most of these federally-granted rail corridors, in the Act of March 22, 1922 Congress disposed of the federal interest upon abandonment to, first, any municipality wishing to establish a public highway along the corridor or, second, adjacent property owners.[4]

We now know that these corridors are worth millions of dollars and are very desirable for trails and greenways. However, under the 1922 Act the federal government is giving away this asset at no charge and, further, is allowing these corridors to be chopped up and plowed under in precise contravention of existing national policy to preserve our built rail corridor system for future rail use, trails and greenways.[5] This represents neither good stewardship of federal assets, nor good fiscal policy, nor good public policy.

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[2] Northern Pacific v. Townsend, 190 U.S. 267, 271 (1903).

[3] Great Northern Railway Co. v. United States, 315 U.S. 262 (1942).

[4] 43 U.S.C. 912. This law specifically reserves subsurface rights in the federal government.

[5] See 49 U.S.C. 10906; 16 U.S.C. 1247(d).

S. 1544 would stop this giveaway of valuable federal assets by amending the 1922 law to recapture the federal interest in these corridors upon abandonment for rail use if not selected by municipalities for public highway use. These corridors, when found suitable by the Department of Interior, would be managed as trails or greenways either by the Department itself or another appropriate federal, state or local public entity. If a corridor is found not suitable for trail or greenway use, it would be sold pursuant to existing procedures governing surplus federal land, with the proceeds placed in a trust fund. Under Section 4 of the bill these proceeds could be used to either acquire new trails or to make low- or no-interest loans to state or local agencies, qualified private organizations, or appropriate federal agencies for projects involving the acquisition or development of trails for public use.

The Right-of-Way Easement Argument

We understand that opponents of S. 1544 now claim that many or most of these federally-granted rights-of-way are only surface easements and that, further, the federal government has patented off all subsurface rights to third parties (a position RTC contests). Opponents accordingly claim that there is nothing left with which the bill can deal.[6] But, if this were case, S. 1544 is still vitally needed. The federal government unquestionably retains the power to regulate the nature of the easement granted to the railroad while that easement continues. Congress has already amended such grants once by allowing railroads to convey a partial interest in these corridors to any state, county or municipality for use as a public highway or street, an interest that continues despite the subsequent cessation of railroad use in the corridor.[7] S. 1544, at the least, would establish that, upon termination of the corridor for railroad purposes, the federal government would reclaim the easement itself for trail or greenway use. Only if the federal government terminates the easement would the easement expire.*

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[6] See City of Aberdeen v. Chicago and North Western Railroad, 602 F. Supp. 589 (N.D. South Dakota 1984), but see State of Idaho v. Oregon Short Line RR Co., 617 F. Supp 207 (D. Idaho 1985).

[7] Act of May 25, 1920, 41 Stat. 621, codified at 43 U.S.C. 913. The term "public highway" is broad enough to encompass the establishment of a public trail. Stegman v. City of Fort Thomas, 273 Ky. 309, 116, S.E. 2d 649, 651 (1938) ("public highway" may be restricted to pedestrians); White v. Meadow Park Land Co., 240 Mo. App. 683, 213 S.W. 2d 123, 125 (1948) (chief criterion of public highway is that it is a transportation route available to the public at large).

Even if S. 1544 has no further effect than to perpetuate a surface easement for trail and greenway use, thousands of federally-granted rights-of-way now lost upon abandonment could be preserved. This is in full keeping with the recommendations of the President's Commission on Americans Outdoors which advised that "thousands of miles of abandoned rail lines should become hiking, biking, and bridle paths."

Conclusion

S. 1544 replaces bad policy with good policy. It would stop the giveaway of a valuable federal asset; it would preserve a ready-made system of linear corridors suitable for building a nationwide trail system; it would bring dollars into the federal treasury; and it would help states and localities throughout the United States build their own trail and greenway systems. Because it is prospective in nature, it in no way affects the vested rights of adjacent owners in already-abandoned corridors. It seeks only to "stop the bleeding" of federal corridors not yet abandoned. Possible future owners of these corridors do not have any vested property interest, they have only an expectancy of receiving a free gift upon abandonment for rail use. It is therefore fair as well as smart public policy.

In its final report to the President, the President's Commission on Americans Outdoors outlined a vision for America's future and challenged all Americans to work towards that vision. "Imagine," the Commission stated, "every person in the United States being within easy walking distance of a greenway that could lead around the entire nation. It can be done if we act soon." S. 1544 is a first, firm step towards implementation of this vision. We strongly urge its swift enactment.

Thank you.

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* Congress has already exercised similar power under the Interstate Commerce Act to regulate privately-granted railroad easements. Under Section 8(d) of the National Trail System Act, 16 U.S.C. 1647(d), Congress directed that privately-granted railroad easements, if railbanked for future rail use through interim trail use, would continue the easement and postpone reversionary claims while in such use. This statute has been challenged as an unconstitutional taking of property by reversionary interest holders in pending litigation before the U.S. Court of Appeals in the D.C. Circuit and the U.S. District Court of the Eastern District of Missouri. RTC is an intervening defendant in both actions.

TABLE 14.—ACREAGE RECEIVED BY RAILROADS FOR RIGHT-OF-WAY AND OTHER CARRIER PURPOSES UNDER FEDERAL AND STATE RIGHT-OF-WAY GRANTS AND BY DONATIONS FROM LOCAL GOVERN- MENTS, INDIVIDUALS, ASSOCIATIONS, AND PRIVATE CORPORATIONS, TOGETHER WITH VALUES A DISPOSITION [1]

Source of acquisition	Acreage, as of dates of acquisition, acquired prior to dates of basic valuation	Acreage disposed of from dates of acquisition to dates of basic valuation [2]		Acreage held and value as of dates of basic valuation [3]		Changes subsequent to dates of basic valuation			Total net proceeds of sales from dates of acquisition through 1937 (3 plus 7)	Acreage as of Dec. 31, 1937 (4 plus 6 less 8)	[illegible] Dec. 31, 1938, of acreage held as of Dec. 31, 1937
		Acres	Net proceeds	Acres (1 less 2)	Value	Net change in acreage from dates of basic valuation through 1937 [4] (a) Addition [5] (d) Disposal [5]	Net proceeds of sales from dates of basic valuation through 1937 [5]	Acreage of abandoned railroads (includes abandonments through 1938)			
	(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)	(11)
	Acres					*Acres*		*Acres*		*Acres*	
Federal Government	[6] 627,0[illegible]	5,0[illegible]	222,891	[6] 621,9[illegible]	[illegible]	(d) 1,4[illegible]	232,917	6,144	[illegible]	[6] 614,342	[illegible]
States	[7] 46,740	[8] 65	[8] 11,6[illegible]	[8] 46,671	9,0[illegible],751	(a) 377	8,944	62	18,[illegible]	[8] 46,0[illegible]	12,1[illegible]
Local governments [9]	2,261	28	25,114	2,2[illegible]	2,640,[illegible]	(a) 166	1,1[illegible]	3	26,[illegible]	2,4[illegible]	4,[illegible]
Individuals, associations, and private corporations [10]	386,702	29,0[illegible]	1,1[illegible]	3[illegible],7[illegible]	71,912,604	(a) 22,[illegible]	462,[illegible]	1,0[illegible]	1,[illegible]	324,771	[illegible]
Apparent aids [11]	[12] 621,733	([12])	([12])	621,733	1[illegible],912,374	(d) [13] 120	[13] 34,1[illegible]	6,473	34,1[illegible]	615,1[illegible]	[illegible]
Total	1,694,199	34,[illegible]	1,1[illegible]	[4] 1,4[illegible]	2[illegible]	(a) 18,[illegible]	[4] [illegible],347	16,[illegible]	1,[illegible]	1,[illegible]	[illegible]

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[1] As indicated by individual footnotes, some acreages shown in the table include lands donated for the purpose of sale, and a relatively small amount of lands donated in connection with industry-track construction. Also the acreages shown as received from the Federal and State Governments include some lands received under Federal and State alternate-section or so-called outlying land grants, respectively, which are used for carrier purposes. The acreages, disposals, proceeds of sales, and values shown in the table are based on the reports of the railroads in response to valuation orders 16 and 25 of the Interstate Commerce Commission and areas and values fixed by the Commission in its valuation proceedings. The values and many of the areas shown in the table are estimates.

To facilitate an understanding of the table, the purposes and provisions of valuation orders 16 and 25 and pertinent phases of the Commission's valuation proceedings will be outlined. As these orders and proceedings are referred to in other tables in the report, the outline will be made sufficiently broad to serve in connection with these tables also. The fifth paragraph of sec. 19a of the Interstate Commerce Act (37 Stat. 701) directed the Commission to ascertain and report the amounts and values of aids, gifts, grants of rights-of-way, and donations to railroads and their predecessors by Federal, State, county, and municipal Governments, individuals, associations, and corporations; grants of land to railroads by such governments, proceeds of sales thereof, and values of unsold portions; and the amounts and values of concessions by the railroads to such governments in consideration of such aids, gifts, donations, or grants. For use in such ascertainment and determination, the Commission on Mar. 26, 1915, issued its valuation order 16 requiring the railroads to report to it, among other things, the amounts of such aids, gifts, donations, grants of rights-of-way and lands, and concessions; the areas of the donated or granted lands and rights-of-way, which had been disposed of, and proceeds of sales; and the areas of such lands and rights-of-way still held.

Based on the reports of the railroads in response thereto, on investigations and inventories by its Bureau of Valuation, and, in some instances, on evidence adduced at hearings upon protests to tentative valuations, the Commission, in its basic valuations of railroads, determined the total areas and values as of the respective dates of basic valuations of all lands and rights-of-way received by each of the railroads as aids, gifts, grants, or donations, dividing the same into those classified as used for carrier purposes, hereinafter called carrier aid lands, and those classified as noncarrier, hereinafter called noncarrier aid lands, and fixing a total acreage and value for each of the 2 classes without, as a rule, segregation as to sources of acquisition. Except for a few railroads having dates as of Dec. 31, 1927 or 1928, the dates of basic valuation of the several railroads were between June 30, 1914, and Dec. 31, 1922, inclusive. The total area of aid lands held by the railroads having valuation dates as of Dec. 31, 1927 and 1928, was relatively small. Aside from a very small difference by reason of the exclusion of some acreage which the Commission determined was not owned by the railroads and the determination by the Commission of the areas of some individual parcels as somewhat different from those reported by the railroads, the aggregate of the areas of carrier aid lands held by all the railroads as of the dates of basic valuation, as determined by the Commission, does not vary from the aggregate of such areas as reported by the railroads, except that the Commission excluded from such areas, reported by the railroads as carrier aid lands, certain lands classified by it as not used for carrier purposes and included such lands in the areas of noncarrier aid lands fixed by it, and except further that the Commission included in the aid areas fixed by it, certain lands not reported by the railroads as aids, but which had been acquired by the railroads under conveyances reciting nominal considerations, and as to which the railroads were unable to show that they had paid substantial considerations. The lands last described were classified by the Commission as apparent aids and are so designated in the table.

The areas shown in the table as received from the Federal, State, and local governments, and individuals, associations, and corporations are aggregates of the respective areas reported by the several railroads as received from such sources, except for adjustments resulting from the exclusion from the areas as of dates of basic valuation of acreage which the Commission determined the railroads did not own and the use of acreages for individual parcels determined by the Commission, where different from the acreages reported by the carriers. The reported areas, as adjusted, are hereinafter called the adjusted reported areas.

As the areas of carrier aid lands, as of dates of basic valuations, fixed by the Commission for the several railroads were lump figures, usually not segregated as to sources of acquisition, in order to determine the total area of apparent aids as of dates of basic valuation, it has been necessary to deduct the total of the adjusted reported areas of noncarrier aid lands of the several railroads, as of dates of basic valuation, from the total of the areas of noncarrier aid lands, as of dates of basic valuation, as fixed by the Commission, add the remainder to the total of the areas of carrier aid lands, as of dates of basic valuation, as determined by the Commission, and from the sum deduct the adjusted reported total area of carrier aid lands as of dates of basic valuation. No attempt has been made to fix the area of apparent aids as of dates of acquisition (prior to basic valuation), disposals thereof prior to basic valuation, and proceeds of sales, and in the table the area thereof as of dates of basic valuation is shown as the area as of dates of acquisition.

By valuation order 25, issued June 15, 1938, and instructions issued pursuant thereto, the Commission required the railroads, among other things, to report all aids, gifts, grants, and donations received by them or their predecessors between their respective dates of basic valuation and Dec. 31, 1937, also any changes, including disposal of lands, between such dates in aids, gifts, grants and donations reported prior to the dates of basic valuation, and the amounts and values of all concessions between such dates to the several governments in consideration of aids, gifts, grants, and donations. The data reported by the railroads in response to order 25 relating to new carrier aid lands and changes in carrier aid lands held as of dates of basic valuation, with a few minor adjustments, are shown in net amounts in columns 6 and 7 of this table.

Areas as of Dec. 31, 1937, shown in the table, have been determined by making additions to or deductions from the respective areas, as of dates of basic valuation, to cover the total net acreage added to or disposed of, respectively, during the period between basic valuations and that date, as reported by the railroads in response to valuation order 25, and by deducting the acreage of all railroads abandoned between dates of basic valuation and Dec. 31, 1938.

The total value, as of dates of basic valuation, shown in the table is the aggregate of the values of carrier aid lands for all railroads, including apparent aids, as of [illegible] dates, as fixed by the Commission, plus the total estimated value of the lands which were reported by the railroads as carrier aid lands but were classified by the Commission as noncarrier. The values shown in the table, as of dates of basic valuation, for the respective areas received from the Federal, State, and local Governments, individuals, associations, and private corporations, and apparent aids, have been determined, as to acreage of several of the larger railroads included in each area, by a summation of values for individual parcels of such lands, as of dates of basic valuation, as shown in inventories prepared by the Commission's Bureau of Valuation and used by the Commission in fixing the total value of aid lands for such railroads, and as to acreages of the other railroads included therein, by a proration of the aggregate value of the carrier aid lands of each of such other railroads, including apparent aids and lands excluded by the Commission as noncarrier, among the several areas.

The values shown in the tables as of Dec. 31, 1938, have been determined by adjusting the values, shown as of dates of basic valuation, to reflect increases or decreases by reason of changes in acreage between dates of basic valuation and Dec. 31, 1938, and the elimination of acreage of abandoned railroads, and by trending such adjusted values so as to reflect changes in land values between dates of basic valuation and Dec. 31, 1938, the trending process being by localities and not on a country-wide basis.

[2] Includes some areas disposed of for considerations other than money or without reported consideration and losses by adverse possession or reversion.

[3] Total acreage shown in this column includes 231,[illegible] acres with a value of [illegible] classified by the Interstate Commerce Commission as noncarrier because of [illegible].

[4] Acreages shown are net quantities, being the excess of disposals over additions or vice versa. Disposals include areas for considerations other than money or without reported consideration and losses by adverse possession or reversion.

[5] Total shown in this column includes [illegible] from land, the allocation of which by sources of acquisition has not been determined, which amount has been prorated among the several sources.

[6] Acreages, as of dates of acquisition, as of dates of basic valuation, and as of Dec. 31, 1937, include 71,[illegible] acres, 71,[illegible] acres, and 72,[illegible] acres, respectively, from Federal land grants used or reserved for carrier purposes. (The last amount is the total shown for all Federal grants in table 12, column 12.) Titles to these acreages vested in the railroads under the land grants. There is also some duplication in the acreages from the Federal grants shown in columns 1, 2, 4, and 5 of table 13 and the right-of-way acreages included in the totals shown from the Federal right-of-way grants in columns 1, 4, and 10 of this table, owing to the fact that the patents to the railroads, covering the alternate sections granted them, include the right-of-way granted by the Government where such right-of-way lies within such alternate sections. However, the total duplicated acreage is relatively small and, therefore, may be disregarded. Under the decision in *Holland Co. v. Northern Pacific Ry. Co.*, 214 Fed. [illegible], the duplicated acreages vested in the railroads under the right-of-way grants and not under the land grants and, consequently, are limited fees.

[7] Does not include 60 acres of tide lands granted to the Southern Pacific R. R. and the Western Pacific (a predecessor of the Central Pacific) by California for carrier purposes and sold by them, after making considerable improvements, to the Southern Pacific Co. for $4,[illegible], which proceeds are not separable between the land in the condition received from the State and the improvements made by the State's grantees. Acreages, as of dates of acquisition, include 1,[illegible] acres from State land grants used for carrier purposes.

[8] Acreages, as of dates of basic valuation, and as of Dec. 31, 1937, include 1,[illegible] acres from State land grants used or reserved for carrier purposes. (This amount is the total shown for all State grants in table 13, column 12.)

[9] Available data do not show what portions, if any, of the acreages shown were donated to or held by the railroads for sale.

[10] Acreages shown include a relatively small acreage donated in aid of industry-track construction. The acreage as of dates of acquisition and that sold between such dates and the dates of basic valuation include some acreage donated for the purpose of sale. Available data do not show what portions, if any, of the acreage held as of dates of basic valuation or as of Dec. 31, 1937, were for sale.

[11] These lands were not reported by the railroads as aids, but were classified by the Commission as apparent aids because the conveyances to the railroads recited nominal considerations and the railroads were unable to show that they paid substantial considerations therefor. Acreages shown include a relatively small acreage donated in aid of industry-track construction. Available data do not show what portions, if any, of the acreages shown were donated to or held by the railroads for sale.

[12] Acreage of apparent aids as of dates of acquisition and disposals thereof between such dates and dates of basic valuation have not been ascertained. The area of apparent aids shown as of dates of acquisition is that held as of dates of basic valuation.

[13] Data as to changes in apparent aids are incomplete.

LOCATION OF FEDERALLY GRANTED RAILROAD RIGHTS-OF-WAY

According to Public Aids to Transportation, Vol. II, the federal government granted numerous rights-of-way to railroads since 1834. Between 1835 and 1875 Congress made several grants of rights-of-way through public lands to railroads by special acts. In 1852 Congress enacted the first federal general right-of-way grant which applied to rights-of-way through public lands. In 1875 Congress enacted the present federal general right-of-way act. This act, which is still effective, also applies to rights-of-way through public lands. Since 1875, the federal government has made a large number of right-of-way grants through national parks, military or Indian reservations and other government lands reserved from sale. The bulk of acreage received under federal right-of-way grants, however, was granted between 1850 and 1871 under right-of-way grants contained within the land grant acts. Total grants amounted to about 628,000 acres.

Approximately two-thirds of the land which the federal government granted to railroads under right-of-way grants went to Atchison, Topeka and Santa Fe (ATSF), Southern Pacific (SP), Union Pacific (UP) or Northern Pacific (NP). In order to identify the specific rights-of-way which the federal government granted to these four railroads RTC researched the reports of ATSF, SP, UP and NP filed in response to I.C.C. Valuation Order 16. These volumes list "lands acquired through aids, gifts, grants of right-of-way or donations (excluding land grants) by the railroad company to June 30, 1916 from the government of the U.S. or from state, county, municipal governments or any individual, association or corporation."

The railroads' reports in response to V.O. 16 list land parcels (most less than ten acres in size) which the federal government granted to the railroads. ATSF and SP indicated the endpoints of the lines which include federal right-of-way grants, enabling RTC to identify the lines which were wholly (or at least 95%) federally granted. The ATSF and SP lines are identified on the attached maps. Since NP and UP did not indicate the endpoints of the lines which include federally granted rights-of-way, RTC was not able to map the lines granted to these two companies. However, we were able to break the NP and UP grants down into total acreage for each state where they were granted.

The total acreage granted to Southern Pacific was 135,769 acres. This land was granted in Arizona, California, Nevada, New Mexico, Oregon and Utah.

The total acreage granted to Atchison, Topeka and Santa Fe was 48,484 acres. This land was granted in six states:

Arizona	16,812 acres
California	5,197 acres
Colorado	3,724 acres

Kansas	3,383 acres
New Mexico	19,273 acres
Oklahoma	95 acres

The total acreage granted to Union Pacific was 135,745 acres. This land was granted in five states:

Colorado	16,979 acres
Kansas	34,449 acres
Nebraska	50,984 acres
Utah	4,396 acres
Wyoming	28,937 acres

The total acreage granted to Northern Pacific was 97,406 acres. This land was granted in seven states:

Idaho	6,387 acres
Minnesota	8,091 acres
Montana	37,465 acres
North Dakota	20,409 acres
Oregon	68 acres
Washington	23,864 acres
Wisconsin	1,122 acres

Between them, AT&SF, SP, NP and UP received over 417,000 acres of the almost 628,000 acres which the federal government granted to railroad companies. Since federal right-of way grants were most commonly 200 feet in width, the grants to these four railroad companies alone comprise approximately 17,500 miles of corridors.

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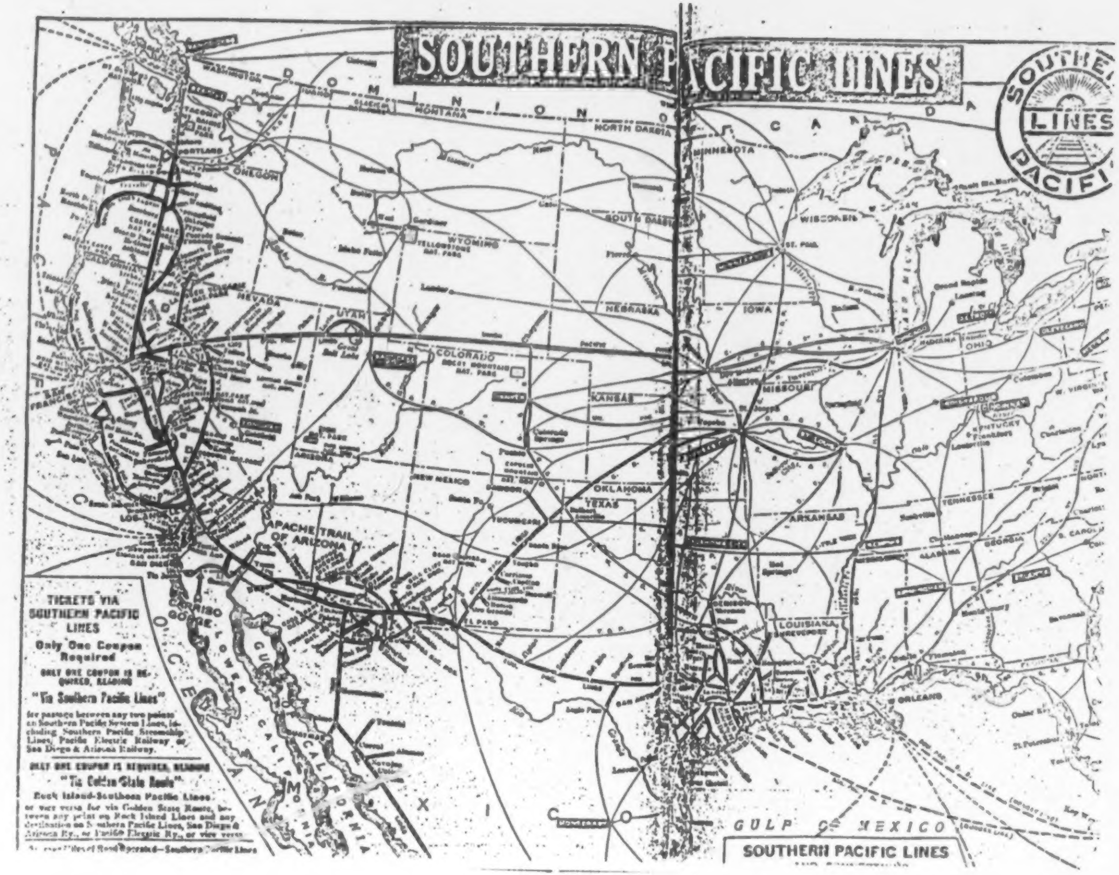


TICKETS VIA
SOUTHERN PACIFIC
LINES

Only One Coupon
Required

ONLY ONE COUPON IS REQUIRED, READING

"Via Southern Pacific Lines"

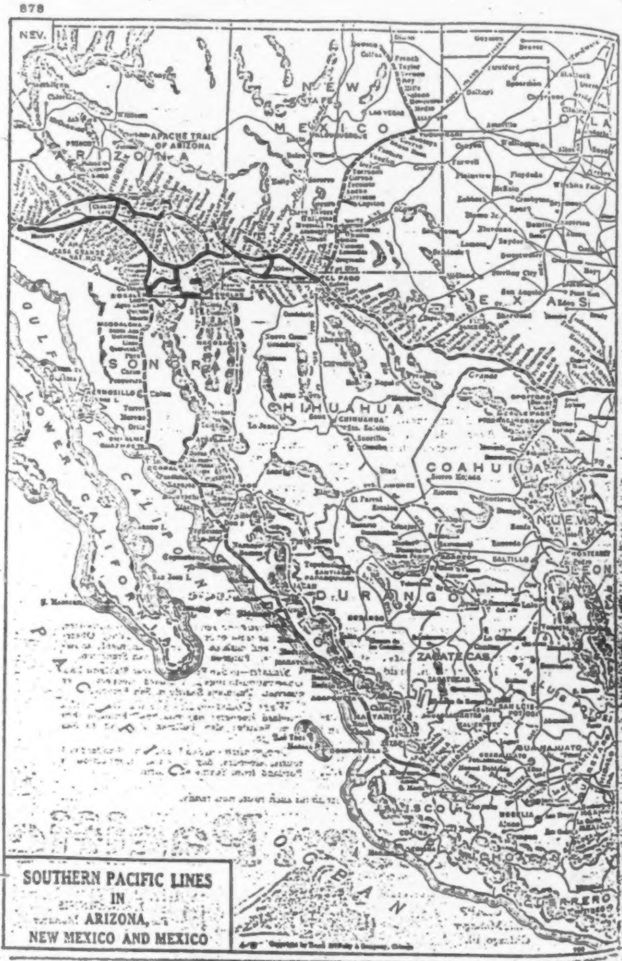
for passage between any two points on Southern Pacific System Lines, including Southern Pacific Steamship Lines, Pacific Electric Railway or San Diego & Arizona Railway.

ONLY ONE COUPON IS REQUIRED, READING

"Via Golden State Route"

Rock Island-Southern Pacific Lines

or vice versa for via Golden State Route, between any point on Rock Island Lines and any destination on Southern Pacific Lines, San Diego & Arizona Ry., or Pacific Electric Ry., or vice versa.



SOUTHERN PACIFIC LINES
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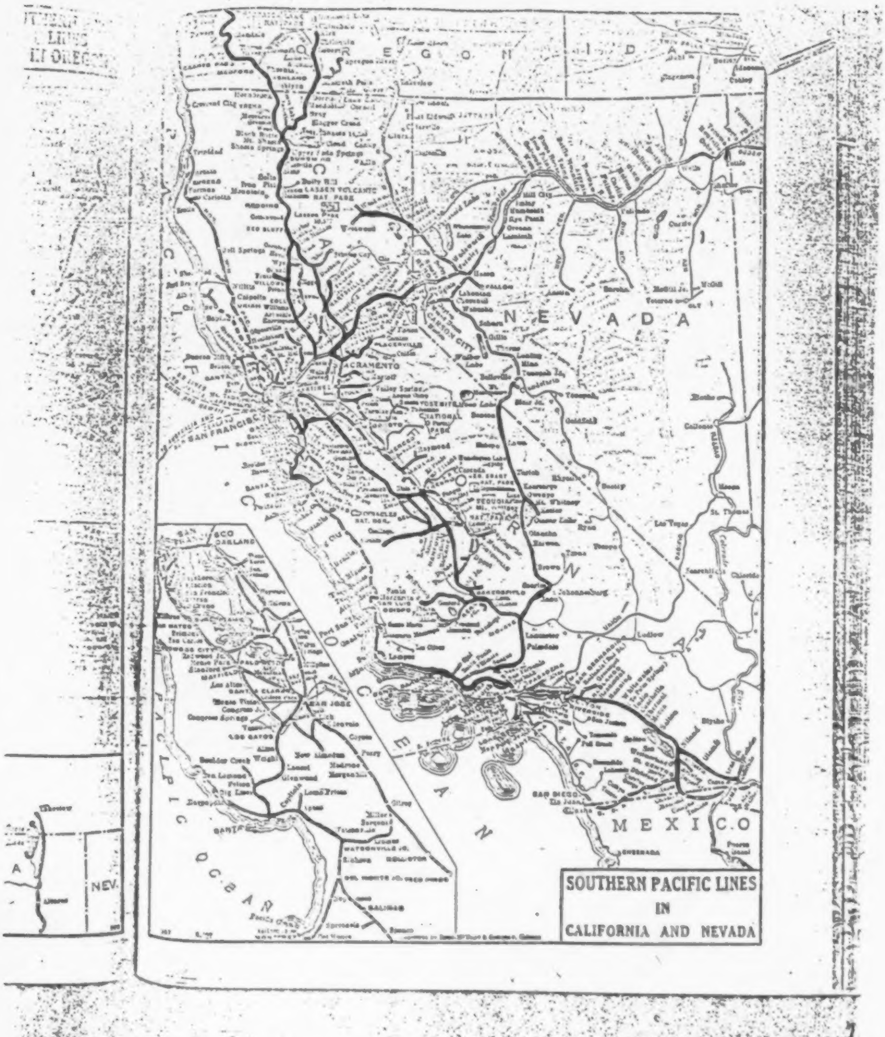

SOUTHERN PACIFIC LINES
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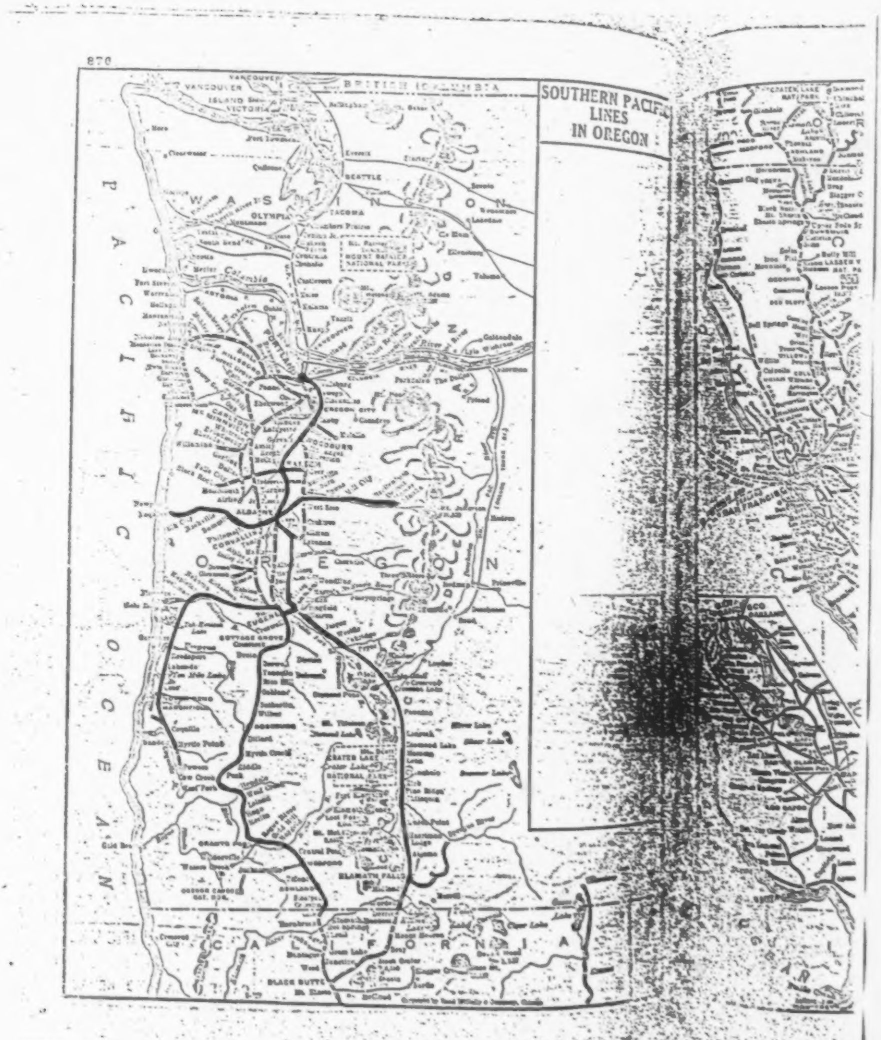
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EUGENE
COTTAGE GROVE
CRATER LAKE NATIONAL PARK
KLAMATH FALLS
CALIFORNIA
BLACK BUTTE
SAN FRANCISCO

85-464 180

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Senator METZENBAUM. Thank you very much, Mr. Burwell.

Our next witness on this panel, and our last witness, is Susan Henley, Executive Director of the American Hiking Society.

STATEMENT OF SUSAN A. HENLEY, EXECUTIVE DIRECTOR, AMERICAN HIKING SOCIETY

Ms. HENLEY. Thank you very much, Senator.

I am very pleased to be here and pleased to support No. 1544. I would also like to say I am pleased to be on a panel with so many Buckeyes. I happen to have been born and raised in Ohio. I do not live there now, but I am a Buckeye. At least I consider myself one.

The use of abandoned railroads for trails is encouraged and directed by both the National Trails System Act and the Railroad Revitalization and Regulatory Reform Act. Yet in the past 12 years, over 40,000 miles of track have been abandoned with very little conversion to trail uses or even preservation of rights-of-ways for future national needs.

Although the administration has not yet responded to the recommendations of the commission we have heard about several times today, many of the local and State agencies, and the private sector, have indeed lit those prairie fires that it refers to, and with a little bit of encouragement from Congress in the form of bills such as S. 1544, could fan those small fires to really catch hold and spread across this great land of opportunity and beautiful natural resources.

One of the major recommendations of the commission was to establish linear corridors. This bill serves as a major stepping stone, an easy one for the Federal Government to accomplish to help attain this recommendation.

The Congress could play an invaluable role in seeing that the efforts are taken to protect and safeguard the recreational resources. This bill would enable the Federal Government to recapture millions of dollars while at the same time establish thousands of miles of trails. The bill does all this by simply terminating the existing giveaway of Federally owned railroad rights-of-way.

The administration has been extremely shortsighted, penny wise and dollar foolish. It cannot support a trails fund due to the Federal deficit; however, it does not raise any question as to how much it is giving away.

All too frequently the opportunity to create a new trail is lost because the local or State government agency involved lacks sufficient funds to purchase a corridor within the brief time period of only 180 days. A fund designed to provide loans to the trail purchasers to acquire the right-of-way before it is broken up piecemeal would be an invaluable tool to assist in retaining some of these corridors.

Let me skip over what the bill could do and give you a highlight of one of the things that it could have prevented. In the Black Hills of South Dakota there is a magnificent railroad right-of-way of about 40 miles through the Custer National Forest. Approximately 80 percent of the right-of-way is actually in the National Forest. As a matter of fact, the Forest Service directs hikers to that area when they ask about where they could go.

The abandonment took place 4 years ago. At that time, although there was some local interest in developing the property, no leadership gelled, and it did not happen quickly enough.

Now the Burlington Northern recognizes that the right-of-way is scenic and of great merit as a trail. It is desirous of cooperating to preserve this facility, but it feels its ability is limited because of the time lapse from abandonment. This trail has probably been lost.

S. 1544 would contribute to preventing this kind of problem from recurring by requiring the Federal Land Management officials in charge of the property to evaluate the property when it becomes available. The bill should, in short, produce the kind of leadership which is needed at the Federal level to retain valuable rights-of-ways for trail purposes on Federal lands.

Another problem I would like to speak about is the Interstate Commerce Commission and its not doing more to assure that railroad rights-of-ways are made available for recreational purposes. Congress has repeatedly addressed this issue. Section 9(b) of the original Trails Act calls for ICC to cooperate in this regard.

Congress recognized that something was awry back in 1976, and now section 10906 of the Interstate Commerce Commission act, the ICC must make a determination of public use suitability of a right-of-way upon abandonment, and must assure that suitable corridors are offered on reasonable terms. Unfortunately, ICC did nothing to enforce this provision either.

The National Park Service in 1985 determined that ICC's performance was dismal. I am submitting for the record a copy of Director Mott's letter to the ICC regarding the C&O Canal towpath and its adjoining Georgetown Spur right-of-way we have heard previously about.

Congress also addressed the issue in the National Trails System Act amendments adopted in 1983. I would like to also mention that the American Hiking Society was the principal proponent of that amendment. It was our intent, or at least we understood and reported to our members that this would require ICC to order the transfer of rights-of-way for railbanking and interim trail use on the terms and conditions set by the Commission.

ICC has interpreted the provision to be applicable only if the railroad voluntarily consents. This interpretation was recently upheld in the ninth circuit. Some carriers have now begun to negotiate under this provision, but many have arbitrarily refused. Others have sought compensation which exceeds the appraised value of the property. This substantially hampers efforts to secure these corridors for public use, and was never the intent of Congress under the National Trails System Act.

Let me finish with what you opened this session with. Recreation is vital to the quality of life, and trails are one of our most important, significant outdoor resources. Not only are they used by hikers and bicyclists and horse riders, which you normally think of as being trail users, but they are also used by hunters, photographers, bird watchers, and may, many others. Rail-to-trail conversions are particularly suited for so many handicapped people who have the opportunity to get outdoors without being on a particularly rugged trail.

It is a way for people to get to their special place if they want to fish, they want to relax by a waterfall, or just sit by a viewpoint and rejoice in the beauty of our great country. It restores the inner spirit. We cannot afford to turn down the opportunity which could lead to the establishment of thousands of miles of potential recreational corridors which can help to someday provide a nationwide network of trails across America.

Thank you, Mr. Chairman, for your interest.

[The prepared statement of Ms. Henley follows:]

STATEMENT OF SUSAN A. HENLEY, EXECUTIVE DIRECTOR OF THE AMERICAN HIKING SOCIETY

REGARD THE SUBJECT: S.1544 / National Trails System Improvements Act of 1987

PRESENTED TO THE
U.S. SENATE
COMMITTEE ON ENERGY AND NATURAL RESOURCES
PUBLIC LANDS, NATIONAL PARKS AND FORESTS
March 3, 1988

Mr. Chairman and members of the Subcommittee, my name is Susan Henley. I am the Executive Director of the American Hiking Society. I speak today on behalf of our membership and our club affiliates with a combined total of over 150,000 hikers. We are pleased to support S. 1544 and recommend its early adoption.

The use of abandoned railroads for trails is encouraged and directed by both the National Trails System Act and the Railroad Revitalization and Regulatory Reform Act. Yet in the past 12 years, over 40,000 miles of track have been abandoned, with very little conversion to trail uses or even preservation of rights-of-way for possible future national need.

Although the administration has not yet responded to the recommendations of the President's Commission on Americans Outdoors, many of the local and state agencies and private sector companies and organizations have indeed lit those prairie fires it refers to and some encouragement from Congress in the form of legislation such as S.1544 could fan those few small fires to really catch hold and spread across our great land of opportunity and beautiful natural resources. One of the major recommendations of the Commission was focused on the importance and the need to protect and establish linear corridors- i.e. trails, rivers & greenways. This bill serves as a major stepping stone - an easy one for the federal government to accomplish - to help to attain the Commissions recommendation. The Congress could play an invaluable role in seeing that efforts be taken to protect and safeguard the potential recreational resources possible along these federal rights-of-way and making them available to our public seeking enrichment in the great outdoors of this nation.

This bill would enable the federal government to recapture millions of dollars while at the same time establish thousands of miles of trails, greenways and linear open spaces which could serve to protect a vast part of the country's land and natural resources. The bill does all this by simply terminating the existing "give-away" of federally-owned railroad right-of-ways. The Administration has been extremely short-sighted, penny wise and dollar foolish. It cannot support a trails fund due to the federal deficit. However it does not raise the question of how much it is giving away.

All to frequently, the opportunity to create a new trail is lost because of local or state government agency involved lacks sufficient funds to purchase a corridor within the brief time period -- only 180 days -- The small appropriation, which this bill calls for is just to get the program underway. Rail trail conversion opportunities must be acted upon when the abandonment is imminent, waiting till next year just is not an alternative, the corridor will be lost forever if timely action is not possible. A fund designed to provide loans to trail purchasers to acquire the right-of-way before it is broken up piecemeal would be an invaluable tool to assist in retaining some of these corridors. The revolving fund provided in this bill is largely self-financed through sales of government land formerly given away. As the rights-of-way are returned the the federal government, the program will more than pay for itself as well as to further what the Congress intended when it first passed the National Trails System Act some 20-years ago.

Enough about what this bill could do. Let me just highlight briefly a specific problem and how the bill will deal with it. In the Black Hills of South Dakota, there is a magnificent railroad right-of-way of about 40 miles in length through Custer National Forest. Approximately 80% of the right-of-way is actually in the National Forest. The entire right-of-way would make a fine trail, and, indeed, Forest Service personnel direct would-be hikers to the right-of-way. The abandonment took place some four years ago. At the time, although there was considerable local interest in developing the property as a trail, no leadership jelled, and the corridor is rapidly retreating into the environment. Although the railroad, Burlington Northern, which now recognizes the right-of-way is scenic and of great merit as a trail, is desirous of cooperating to preserve this facility, it feels that its ability to do so is limited because of the time lapse from abandonment. Although South Dakota is now working to preserve this right-of-way, the State's ability to do so could have been greatly enhanced had federal authorities taken a more timely and aggressive position in the matter.

S.1544 would contribute to preventing this kind of problem from recurring by requiring the federal land management officials in charge of the property to evaluate the property when it becomes available, and also to make the property available to local or state agencies or qualified private organizations for trail purposes. The bill should in short produce the kind of leadership which is needed at the federal level to retain valuable rights-of-way for trail purposes on federal lands.

There is another problem which we recommend that the Committee consider. Advocates of trails have for some two decades expressed concern that the Interstate Commerce Commission is not doing more to assure that railroad rights-of-way are made available for trail use upon abandonment. Congress has repeatedly addressed this issue. Section 9(b) of the original Trails Act calls for ICC to cooperate in this regard. When Congress revised rail regulation in 1976, several amendments provided for a study of so-called rail trails by the Interior Department. Interior concluded that at least a third of railroad rights-of-way were suitable for public use upon abandonment. However, very few of these are being so devoted. Even before this report, Congress recognized that something was awry, and specifically provided in what is now section 10906 of the Interstate Commerce Act that ICC must make a determination of public use suitability of a right-of-way upon abandonment, and must assure that suitable corridors are offered by the railroad for such use on, quote, "reasonable terms." Unfortunately, ICC did nothing to enforce this provision either. Indeed, the National Park Service in a report issued in 1985 termed ICC's performance "dismal." I am submitting for the record a letter from Director Mott to the ICC asking the ICC to take appropriate action to set "reasonable terms" under 10906, which happens to involve an abandonment that is along the C&O Canal towpath right here in the District of Columbia. We understand that this request is being rejected by ICC.

Congress also addressed the issue in the National Trails System Act Amendments adopted in 1983, which, I might add, the American Hiking Society was a principal proponent of that amendment. One of the newly adopted provisions was section 8(d) of the Trails Act. This provision was intended, or at least we so understood and reported to our members, to require ICC to order the transfer of rights-of-way for railbanking and interim trail use on terms and conditions set by the Commission, so long as the railroad was relieved of future liabilities. In other words, the new provision was intended to assure at least some enforcement of section 10906. But ICC has interpreted that provision to be applicable only if the railroad voluntarily consents. This interpretation was recently upheld by the Ninth Circuit. Although some carriers have now begun to negotiate under this provision, many have arbitrarily refused, and others have sought compensation which exceeds the appraised value of the property. This substantially hampers efforts to secure these corridors for public use and was never the intent of Congress under the National Trails System Act.

We continue to believe that the public interest will not be served until ICC recognizes, or is compelled to recognize by legislation, that it should set terms and conditions for transfer of otherwise abandoned rail lines for alternative public uses upon the request of an interested party. This is exactly the area of ICC's expertise, and the agency does it all the time for private parties seeking a corridor for continued private rail use.

Recreation is vital to the quality of life. Trails are one of our most significant outdoor resources, not only are they used by hikers, bicyclist, horse riders, etc. but also many other recreationist, hunters, photographers, bird watchers and many others use them to reach their special place to fish, relax by a waterfall or just sit at a viewpoint and rejoice in the beauty of this great country. It restores the inner spirit. We can not afford to turn down opportunity which could lead to the establishment of thousands of miles of potential recreational corridors which can help to someday provide a nationwide network of trails across America.

Mr. Chairman, thank you for your time and interest. We support the bill and encourage its adoption.

L34(765)

DEC 18 1987

Honorable Heather Gradison
Chairwoman, Interstate Commerce Commission
Twelfth Street and Constitution Avenue, N.W.
Washington, D.C. 20423

Dear Madam Chairwoman:

This letter addresses the public recreational use of the Georgetown Branch Railroad right-of-way upon abandonment (Baltimore and Ohio Railroad Abandonment) through Montgomery County, Maryland, and the District of Columbia, [AB-19 (Sub-no. 112)]. It also supplements the National Park Service's comments submitted by our Mid-Atlantic Regional Office in Philadelphia on April 29, 1987 (copy enclosed).

Due to the significant potential impact of this proposed abandonment on the Chesapeake and Ohio Canal (C&O) National Historic Park, and the importance of preserving the linear integrity of the entire corridor from Georgetown to Silver Spring, I am writing you directly.

The Interstate Commerce Commission (ICC) is currently considering the proposal of CSX Corporation, owner of the Baltimore and Ohio Railroad, to abandon the Georgetown Branch of the latter line. That Branch commences a mile north of downtown Silver Spring, Maryland, traverses Rock Creek Park, crosses downtown Bethesda, and enters the District-of Columbia at the Delecarlia Reservior. From that point, the right-of-way is either adjacent to, or actually inside, the boundaries of the C&O Canal Park until its terminus in Georgetown.

The Georgetown Branch should be secured for public recreational use for its entire length. If converted to recreational trail use the corridor would, in combination with the C&O Canal towpath and the Rock Creek Park, create a 20-mile inside-the-Beltway loop, all of which would be relatively free of motor vehicular cross traffic. Moreover, the corridor inside the District is necessary both as a buffer and as part of the C&O Canal National Historic Park. The National Park Service is also responsible for the District of Columbia portion of Rock Creek Park and regards conversion of the Georgetown Branch to recreational use as complementary to that park as well.

The President's Commission on Americans Outdoors, in its January 1, 1987, Report, recommended the creation of additional "greenways" in urban areas. A prime example of an excellent "greenway" is an about-to-be abandoned rail corridor. Conversion of the Georgetown Branch to recreational trail use would clearly be consistent with the recommendations of the President's Commission. Because of the obvious importance of this corridor for two national park units and in its own right, because recreational use of the corridor fits overall recommendations on national recreational policy, and because conversion to recreational use would serve as a fine example for the Nation, the National Park Service supports acquisition of the Georgetown Branch right-of-way for public recreational use. We believe that all Federal agencies should cooperate to the utmost in securing the right-of-way for that purpose.

We have been negotiating with the CSX Corporation and will continue to do so to acquire the Georgetown Branch. We intend to pursue those negotiations to reach agreement on purchase of the right-of-way. However, we request that the Interstate Commerce Commission issue an order under 49 U.S.C. 10906 requiring the railroad to offer the right-of-way for sale for public use "on reasonable terms." We would appreciate it very much if the ICC would establish the mechanism to determine "reasonable terms."

A historic rail group is interested in seeking to continue to operate the corridor for rail purposes. We are working with that group to explore the possibility of operating a historic railroad. While an application may be filed under 49 U.S.C. 10905 if abandonment is authorized, we would prefer to pursue acquisition of the right-of-way under U.S.C. 10906.

Furthermore, the National Park Service supports Montgomery County's decision to acquire the corridor throughout the County for recreational trail purposes pursuant to Section 8(d) of the National Trails System Act, 16 U.S.C. 1247(d). Use of Section 8(d) may be necessary to assure non-interruption of the corridor due to possible reversionary claims.

Lastly, we ask the Interstate Commerce Commission, pursuant to Section 9(b) of the National Trails System Act, 16 U.S.C. 1248(b), to advise the Secretary of the Interior as to what action the Commission proposes in order to assure that those Federal agencies having jurisdiction or control over this abandonment recognize the suitability and the significance of this corridor for improving and expanding the National Trails System. This is particularly critical in assuring development of a continuous trail along the corridor which traverses the Dalecarlia Reservation operated by the Department of Defense.

I thank the Commission for its work in this area, and I hope that we can cooperate to secure this property for public use. It is truly a once-in-a-lifetime opportunity.

Sincerely,

William Penn Mott, Jr.
Director

Enclosure

Senator **Metzenbaum**. Thank you very much. We appreciate your testimony, and appreciate the testimony of each of the witnesses, and we may submit some questions to you, but your testimony has been very, very helpful today, and we appreciate it greatly.

Thank you.

Our next panel consists of Richard Welsh, Executive Director of the National Association of Reversionary Property Owners of Issaquah, WA and Richard Krause, Assistant Counsel, American Farm Bureau Federation.

STATEMENT OF RICHARD WELSH, EXECUTIVE DIRECTOR, NATIONAL ASSOCIATION OF REVERSIONARY PROPERTY OWNERS, ISSAQUAH, WA

Mr. **Welsh**. Good afternoon, Mr. Chairman and members of the staff. My name is Richard Welsh. I am the Executive Director of the National Association of Reversionary Property Owners, located in Issaquah, WA, which is a suburb of Seattle.

Our organization is made up of a core group of 1100 property owners throughout the State of Washington. We have associate groups in 31 other states.

Our purpose is to educate the property owners around the country that own property abutting or adjacent to railroads as to who really owns the underlying land the railroad tracks are on.

I am here today to speak in opposition to Senate Bill 1544. The general purpose of the bill, in a broad sense, is to repeal the provisions of the 1922 Abandonment Act, which designates how some U.S. Government granted right-of-ways are disposed of after abandonment by the railroad. The other provision of the bill, of course, is to create another bureaucracy called the Trails Fund.

The proposed bill takes away the property rights of thousands of property owners from Illinois to the Pacific Ocean, in that these property owners have long relied on the proposition that the land the railroad right-of-way crosses belonged to them after abandonment, free of the railroad easement.

State property law rules that when an easement is terminated or extinguished, then the underlying land is free of the easement. The property descriptions have long been interpreted as only subject to the use of the railroad right-of-way. In fact, the Interior Department regulations 43 CFR 2842.1 section A, 1976, I will quote the second sentence of that, the Government conveys a fee simple title in the land over which the right-of-way is granted to the person to whom the patent issues from the legal subdivision on which the right-of-way is located, and such patentee takes the fee subject only to the railroad's right and use possession.

That is speaking in terms of the 1875 right-of-way, General Right-of-way Act and how those rights-of-way were given out.

The background summary of the bill by the Congressional Research Service, which I believe was done with a slanted bias toward adoption of the bill, the summary was done in 1984 and not updated, and it leaves out three of the most recent cases that are squarely on point on this. That is *U.S.* v. *Union Pacific Railroad*, 1957, the *Energy Tranportation System* v. *Union Pacific in 1979, and the*

Aberdeen v. *Chicago Transportation* and the Chicago North Western in January 1984. I notice that Mr. Burwell on the other side quoted the only case he could find in all of the legalhood of the Oregon Short Line case, which was the only one of a different point of view.

Also, the CFR I quoted above was not included in that congressional research paper.

The Department of the Interior is evidently relying on, it appeared, until they spoke earlier today, on that research paper, and obviously they are going to redo that and come up with their own paper, which was a surprise to me when I heard that testimony earlier.

The bill allows an entirely different use of the right-of-way than was envisioned more than 100 years ago by some of these patentees when they acquired their patents. Homes and businesses are built right next to these right-of-ways, and the changing of the use to an open recreational use would be detrimental to the adjacent properties.

An analogy of that would be abandoning a Federal highway, for whatever reason, and then building an airport on the abandoned right-of-way. I cannot imagine too many people appreciating an airport in their front yard or their back yard or alongside their house.

There is no provision in the bill for Federal condemnation. Due to the existing court precedents, most if not all of the right-of-ways addressed in this bill would have to be condemned in order for the government to take control of the underlying land.

There is no provision in the bill to provide an appropriation for condemnation.

I might mention that everybody earlier was talking about the President's Commission on Americans Outdoors. When the President's Commission on Americans Outdoors report came out, it talked about abandoned railroads right-of-ways for trails, but it talked strictly about volunteer action by the abutting property owners. No condemnation actions were mentioned or contemplated in the final report of the President's bill.

I have submitted a legal opinion from Mr. Thomas McFarland, an attorney in Chicago. That is, I supplied 50 copies to the staff yesterday. I will not get into that.

Senator **Metzenbaum**. Well, in that—I looked at the legal opinion. He says that the United States owns the title, fee title having remained in the United States, there is no reversionary interest in the United States upon the abandonment of the rights-of-way upon which either 43 U.S.C. 912 or the bill could operate.

As I understand what he is saying, he is saying that the United States has the title. If they have the title, then how can anyone claim to have any reversionary interest in it?

Mr. **Welsh**. I would like to—I was going to speak to that, Senator.

The first two pages is what he calls his executive summary, and we did not have enough time for me to go over that after I received it from him. You have to read that in context preferably with the memorandum behind there.

Mr. McFarland splits the Federal grant right-of-ways into three separate sections, 1850 to 1862, 1862 to 1871, and 1871 to the present. His three sentences in there speak to those three things, but they do not delineate that. His third sentence is speaking in regards to the land that the Federal Government still is the abutting owner of, and when you read the rest of his memorandum, you will see that he quotes the court cases that decided this, and the CFR, and the Department of Interior opinions.

His first page on the executive summary is very—in fact, it was tough for me to understand what he was talking about, and I called him before we came out here today to——

Senator **Metzenbaum**. I guess I do not understand your position. I am really having trouble comprehending.

Mr. **Welsh**. Well, our position is that the Federal Government, when they patented the land, sir——

Senator **Metzenbaum**. When they what?

Mr. **Welsh**. When they patented the land to the homesteader or to whoever it happened to be back in the 1800's and even into the 1920's, the Federal Government gave those patents, or sold those patents with the underlying—with the railroad on them already, and they sold whatever interest they had in the right-of-way when they sold the patents, or when they gave the patents. A lot of them were given.

Senator **Metzenbaum**. You are talking about patents, and I am talking about what his letter says.

First of all, he says the bill is a nullity, it will not make any difference. It says it will have little or no legal effect.

So if it has little or no legal effect, you do not have anything to object to, do you?

Mr. **Welsh**. The objection we have is trying to go to court to overturn any effect that the bill would have.

Senator **Metzenbaum**. But it has no effect. He says so. He says it has no effect, so what are you worrying about?

Mr. **Welsh**. If you pass the bill, it is just like the Trails Act, 1247(d). There are two major lawsuits in Federal Court on that on the challenge, and I happen to have one of them. One of them we have already argued that before the U.S. Appeals Court, waiting for a decision. The other one is sitting in the Missouri Federal Court right now, St. Louis Federal Court, and exactly what you are suggesting here is they passed the bill, and even back then there was a problem with the challenge of the constitutionality of part of 1247(d).

Senator **Metzenbaum**. Is it not correct that none of the right-of-way in the *Missouri* case was federally granted?

Mr. **Welsh**. There is some of that. It was part of the Federal grant.

Senator **Metzenbaum**. What?

Mr. **Welsh**. Part of the right-of-way is federally granted in the *Missouri* case. I think there is around—not very many miles compared to the 200 miles total of the Missouri Katy Railroad, I think there are just a few sections in there that were still owned by the Government when the railroad went through.

Senator **Metzenbaum**. Well, I guess the difficulty I am having with your testimony, Mr. Welsh, is to understand it based upon your lawyer's analysis. He says two things. He says, one, the bill would have very little or no legal effect. If it has no legal effect, then you do not have to worry about it. It is a nullity.

The second thing he says, fee title having remained in the United States, there is no reversionary interest in the United States upon abandonment of the rights-of-way upon which either 43 U.S.C. 912 or the bill could operate. Therefore, you can step aside and say, well, it has no effect, and our lawyers will point that out if it ever gets enacted.

Mr. **Welsh**. That is true, and that could happen, but I would much rather have the bill either not passed at all, or passed in a constitutional method so that we do not have to go to court again sometime down the road when the first—let's just say you passed the bill as it is today, and they abandon a railroad. Then the first person that has his property taken or thinks he has his property taken would have to go to Federal Court on it, and that is what we are trying to forestall.

And I think what the Interior Department and Mr. Mott both said, they both have a problem with the legal titles. Maybe the Federal Government does not have any interest whatsoever in these right-of-ways.

The first two pages of Mr. McFarland's thing have to be read with the following nine pages, and I think that would—it clarifies his position more than particularly his first page. I do not think it is in the proper context.

Senator **Metzenbaum**. Well, you say that, and yet I have to say that the first two pages are his letters, and they are very succinct in what he is saying, and so I have to—I do not know how you can say to me pay no attention to this lawyer's letter.

Mr. **Welsh**. No, I did not say that.

Senator **Metzenbaum**. I try to read it as it is, and it is widely acknowledged that under the 1922 act, that a State government can claim a federally granted right-of-way for public highway purposes for free within one year of abandonment.

Do you believe that also constitutes a taking?

Mr. **Welsh**. It depends on what type of—how the right-of-way was originally granted. If it was an 1862 to 1871 grant or an 1871 to present grant.

Now, the Federal Court in the *Aberdeen* case in 1981, 1984, said that th 1875 act granting right-of-ways was—the 1922 act did not affect 1875 right-of-way grants. They made the imposition, they intimated that possibly 1862 to 1871 right-of-way grants would be affected by the 1922 law, and it is Mr. McFarland's opinion in his memorandum that even the 1862 to 1871 right-of-way grants would not be affected under the *Energy Transportation System* case of 1979, which, I am not an attorney, I cannot speak to that case. I am sorry.

Senator **Metzenbaum**. Well, thank you very much, Mr. Welsh. We will take your testimony into consideration.

Your entire statement will be included in the record.

[The prepared statement of Mr. Welsh follows:]

National Association of Reversionary Property Owners
2311 E. LAKE SAMMAMISH PL. S.E. ISSAQUAH, WA 98027
(206) 392-1024

Richard Welsh, Executive Director

March 3, 1988

To: The Subcommittee on Public Lands, National Parks and Forests

The National Association of Reversionary Property Owners is a group of property owners united together to educate the citizens of the United States about the true ownership of railroad, utility, highway and governmental **Rights-Of-Way.**

This is the Association's information packet in opposition to proposed Senate Bill 1544 now before the Public Lands, National Parks and Forests Subcommittee of the Senate Energy and Natural Resources Committee.

This packet contains behind this cover sheet:

Tab 1. Bill Description by Section, Background and Summary prepared by the National Association of Reversionary Property Owners

Tab 2. The Legal Effect and Constitutionalty of Senate Bill 1544 prepared by Mr. Thomas McFarland a transportation specialist attorney from Chicago, Illinois

Tab3. A Memorandum of the Legal Effects of Federal Grants of Right-Of-Ways to Railroads prepared by Mr. Thomas McFarland

The Association wants to thank the Chairman and the Subcommittee for the opportunity to present our views on Senate Bill 1544.

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United States Congress
Senate Bill 1544 of 100th Congress

BILL DESCRIPTION BY SECTION

Section 1. Short Title: National Trails System Improvement Act of 1987
Section 2. Findings
Section 3. Amend Section 9 of National Trails System Act by repealing most of Act of March 8, 1922 (43 USC 912) and allowing the donation or selling of abandoned railroad right of way land to private entities or other governments.
Section 4. Setting up new bureaucracy called Trails Fund and calling for appropriation of $700,000 per year for administration and trails purchases. Designating Dept. of Interior to make rules. Calls for yearly report.

BACKGROUND:

In 1850, 1862 and 1864 Congress passed laws granting railroad right of ways and alternate section land grants to several railroads for the purposes of opening up the western United States.

In 1871 Congress changed its attitude on railroad land grants and only granted right of ways for railroad purposes to railroads.

In 1875 Congress passed the General Right of Way Act which granted 200 foot right of ways to railroads for railroad purposes. The 1875 Act differed from previous Acts as there was no inclusion of land grants. Under this 1875 Act, railroads could build their railroads on government land and notify the local land office after completion of each 20 mile section with a map of definite location.

In 1922 Congress passed the Act of March 8, 1922, (43 U.S.C. 912) which provides for the disposition of abandoned or forfeited railroad grants. This Act provides that abandoned right of ways vest or revert to the abutting property owner.

There is a difference between the pre-1871 right of way grants and the post-1871 right of way grants. Pre-1871 grants left the land the right of way was on in ownership of the U.S. even if the land was later patented, but in post-1871 right of way grants, the land the right of way was on went with the patentee, subject only to the railroad use. See Great Northern v. U.S., 315 US 262, 272 (1942), State of Wyoming v. Udall, 379 F.2d 635, (10th Circuit 1967), cert. denied 389 US 985 (1967), Energy Transp. Systems, Inc. v. Union Pacific R. Co., 606 f.2d 934, 937 (10th Cir. 1979), City of Aberdeen v. Chicago Transp., 602 F. Supp. 589, (1984), see also, 43 CFR 2842.1(a).

The 1922 Act has been held by the some federal courts to only pertain to pre-1871 right of way grants because the U.S. retained an interest in the pre-1871 grants. In post-1871 grants the courts have held that the future patentee got the interest of the right of way with the patent, subject only to the railroad use, and the 1922 Act does not apply. See above cites.

SUMMARY:

The proposed Bill will take away the property rights of thousands of property owners from Illinois to the Pacific Ocean in that these property owners have long relied on the proposition that the land the railroad right of way crosses belongs to them after abandonment, free of the railroad easement. State property law rules that when an easement is terminated or extinguished then the underlying land is free of the easement. The property descriptions have long been interpreted as only "subject to the use of the railroad". Their title companies have long been insuring their properties as only "subject to the railroad right of way". In fact Interior Department regulations, 43 CFR 2842. 1(a) (1976), describing the nature of the 1875 Right-of-Way Act read as follows:

> "A railroad company to which a right-of-way is granted does not secure a full and complete title to the land on which the right-of-way is located. It obtains only the right to use the land for the purposes for which it is granted and for no other purpose, and may hold such possession, if it is necessary to that use, as long and only as long as that use continues. The Government conveys the fee simple title in the land over which the right-of-way is granted to the person to whom patent issues for the legal subdivision on which the right-of-way is located, and such patentee takes the fee subject only to the railroad company's right of use and possession".

The background summary on the Bill by the Congressional Research Service was done with a slanted bias towards adoption of the Bill. The summary was done in 1984, but it leaves out three cases that were already decided that are most squarely on point, U.S. v. Union Pac. Railroad, 353 US 112 (1957), Energy Transp. Sys. v. Union Pac. R., 606 F.2d 934 (10th Cir. 1979), Aberdeen v. Chicago Transp. 602 F. Supp.589, (Jan. 1984). Also the summary did not mention 43 CFR 2842.1(a) as quoted above.

The Bill allows an entirely different use of the right of way than was envisioned more than 100 years ago by the patentees when they acquired their patents. Homes and businesses are built right next to these right of ways and changing the use to an open recreational use would be detrimental to the adjacent properties. An analogy would be abandoning a federal highway and then building an airport on the abandoned road right of way.

There is no provision in the Bill for condemnation of private property. Due to existing court precedence, most if not all of the right of ways addressed in the Bill would have to be condemned in order for the government to take control of the underlying land. There is no provision in the Bill to provide an appropriation for condemnation. When the Presidents Commission for American Outdoors report talked about abandoned railroad right of ways for trails, it talked about strictly volunteer actions by property owners, no condemnation actions were mentioned or contemplated.

See the attached legal analysis and Memorandum from Mr. Thomas McFarland. Mr. McFarland is an attorney that specializes in railroad abandonment, and he is an expert in right-of-way ownership, both from government grants and non-government deeds.

All things considered, there is no basis for Senate Bill 1544.

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February 25, 1988

Mr. Richard Welsh, Executive Director
National Association of Reversionary
Property Owners
2311 East Lake Sammamish Place, SE
Issaquah, WA 98027

Re: Senate Bill No. 1544, The National Trails System Improvements Act of 1987

Dear Mr. Welsh:

You have asked that we analyze the legal effect and constitutionality of the above Bill.

The Bill would have very little or no legal effect. In 43 U.S.C. 912, the United States assigned its reversionary interest in land that was granted to railroad companies for use as rights-of-way, to municipalities or adjacent landowners in the event of abandonment of such rights-of-way. The Bill proposes to take back that assignment prospectively. Except with respect to the very early land-grants for rights-of-way prior to 1862, the Courts have ruled unequivocally that rights-of-way granted by the United States were easements only, and that the fee interest in the land remained in the United States. In that respect, as to rights-of-way granted between 1862 and 1871, see United States v. Union Pacific Railroad Co., 353 U.S. 112, 119 (1957), and Energy Transp. Systems, Inc. v. U. Pac. R. Co., 606 F.2d 934, 937 (10th Cir., 1979). As to rights-of-way granted after 1871 under right-of-way statutes, including the General Right-of-Way Act of 1875, see Great Northern Railway Company v. United States, 315 U.S. 262, 277 (1942), and City of Aberdeen v. Chicago & North Transp., 602 F. Supp. 589, 593 (D., So. Dak., N.D., 1984); see, also, 43 C.F.R. 2842.1(a). Fee title having remained in the United States, there is no reversionary interest in the United States upon abandonment of the rights-of-way upon which either 43 U.S.C. 912 or the Bill could operate. The same undoubtedly is true of the pre-1862 land-grant rights-of-way; however, that fact has not yet been judicially determined. In that the Bill would have such minimal or no legal effect, it will not accomplish its stated objective of recapturing sufficient reversionary interests of the United States to provide for a self-financing "trails fund."

Notwithstanding the clear limited effect of the Bill, some of its background materials suggest that it will be attempted to be applied to all rights-of-way granted by the United States, on the incorrect predicate that the United States has a reversionary interest in all of such rights-of-way. Such an application clearly would be unconstitutional as a taking of private property for public use without just compensation in violation of the Fifth Amendment.

It is argued in the background materials of the Bill that there would be no such taking because the interest of adjacent landowners in such rights-of-way under 43 U.S.C. 912 is contingent and reversionary, so that it does not vest into a constitutionally-protected interest until actual abandonment of such rights-of-way occurs. On the contrary, the interest of adjacent landowners in such rights-of-way derives from their patents of fee title from the United States (which, as shown, retained such title in the grants), not from or by virtue of 43 U.S.C. 912. When the easement for the right-of-way is abandoned, the adjacent landowners enjoy the use of the land that they already own. City of Aberdeen v. Chicago & North Transp., supra, 602 F. Supp., at p. 593. Unquestionably, the fee title of adjacent landowners, vested at the time of their patents from the United States, is a constitutionally-protected private property interest under the Fifth Amendment.

It would seem that the Bill should not be enacted because it will not accomplish its stated legislative objective, but instead, as apparently sought to be applied, it will engender extensive constitutional litigation that will not be fruitful for the United States and that will be costly for its patentees.

In the next several days, I will furnish a memorandum that provides additional support for the legal conclusions that appear in this letter.

Very truly yours,

Tom McFarland

Thomas F. McFarland, Jr.

TMcF:ml:3425

MEMORANDUM

LEGAL EFFECTS OF FEDERAL GRANTS OF RIGHT-OF-WAY TO RAILROADS

I. Types of Federal Grants of Right-of-Way

The history of Congressional aid for railroad construction in the nineteenth century can be divided into two distinct time periods: (1) 1850-1871 and (2) post-1871.[1]

The first period began with the Chicago and Mobile Act of September 20, 1850 (9 Stat. 466), and ended with the Texas and Pacific Act of March 3, 1871 (16 Stat. 573). The 1850-1871 period was noted not only for grants of right-of-way through the public domain, but also for large grants in fee of square-mile sections in checker-board fashion to railroads who successfully constructed the prescribed rail routes. The Acts between 1850 and 1871 caused a total of over 130 million acres of public land to be eventually patented to 70 individual railroad companies.

The second period of Federal aid, post-1871, took the form of rights-of-way only across public lands for railroad location.

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[1] History of Railroad land grants from the following:

Paul W. Gates, History of Public Land Law Development (Public Land Law Review Commission, 1968).

Public Aids to Transportation Vol II, Aids to Railroads and Related Subjects (Federal Coordinator of Transportation, 1938).

After the Texas and Pacific Act of March 3, 1871, Congress ended its policy of lavish grants of sectional land to newly-constructed railroads. Congress passed at least 15 separate "Right-of-Way" acts between 1871-1875 for individual railroads that needed to locate their right-of-way across public lands and could not do so by their limited eminent domain powers against Federal property. Congress therefore passed the General Right-of-Way Act of March 3, 1875 (18 Stat. 482) to allow any railroad chartered by a state, territory, or Congress to obtain a 200-foot wide right-of-way through the public lands.

The Chicago and Mobile Act of September 20, 1850, which created the Illinois Central and the Mobile and Ohio Railroads, was a Federal grant to the states of Illinois, Mississippi, and Alabama for a 200-foot right-of-way and every even numbered section of land within 6 miles on either side of the actual railroad as constructed. The sections of public land patented to the railroad within 6 miles of the main line were known as "primary lands" or "place lands." If these even numbered sections were previously disposed of by the Federal government, then the railroad could select even numbered "indemnity lands" or "in lieu lands" out to 15 miles on either side of the rail line to make up for a deficiency in place lands. The railroad right-of-way would cross public land sections that would remain with the government (odd numbered) and also sections (even numbered) which the railroad would earn by construction.

The Chicago and Mobile Act was typical of all of the land grant acts up until the First Pacific Railroad Act of July 1, 1862 (12 Stat. 489). Those Acts before 1862 were grants to individual states which acted in a sort of trust capacity for the railroads until the grant was earned for the company by construction. None of the pre-1862 Acts (all to states) contained a mineral reservation, while all of the grants from 1862 to 1871 (some to states and some to individual railroads) did contain such a reservation.

The Pacific Railroad Act of July 1, 1862 was Federal aid directly to the Union Pacific and Central Pacific Railroads to construct the first transcontinental railroad from Omaha, Nebraska to San Francisco, California. A 400-foot right-of-way was granted by Section 2 of the Act. Section 3 granted every odd numbered section of place land up to 20 miles on each side of the railroad with the exception that mineral land sections could not be selected.

II. Judicial Construction of Right-of-Way Property Interests

The Supreme Court in Northern Pacific Railway v. Townsend, 190 U.S. 267 (1903); classified the railroads' interest in 1850-1871 land grant right-of-way as a "limited fee, made on an implied condition of reverter in the event that the company ceased to use or retain the land for the purpose for which it was granted" (at p. 271). Townsend dealt with the Pacific Railroad Act of July 2, 1864 (13 Stat. 365) (400-foot right-of-way grant), and ruled that a homesteader could not use adverse possession to gain title to areas within the right-of-way. Townsend, at p. 272, reconfirmed the principle that when Congress granted a 400-foot right-of-way it would have to remain a 400-foot right-of-way, and neither adverse possession claims nor attempted sale by the railroad could narrow the width of the corridor. A later act of Congress allowed the Northern Pacific to alienate the right-of-way up to 100-feet on either side of the rail line.

The General Railroad Right-of-Way Act of 1875 was first interpreted by the Supreme Court in Rio Grande W. Ry. Co. v. Stringham, 239 U.S. 44 (1915). The Court, citing Townsend, took note that the rights granted under the 1875 Act, and similar Acts, were "neither a mere easement, nor a fee simply absolute, but rather a limited fee . . ." (at p. 47). By the ruling in Stringham, the "limited fee" analysis in Townsend was engrafted on the Right-of-Way Act of 1875. However, 27 years later in 1942, the Supreme Court would overrule Stringham with respect to the Right-of-Way Act of 1875.

It was against the background of the Townsend and Stringham decision, to the effect that both 1850-1871 and post-1871 Federally granted rights-of-way were considered to be limited fees subject to reversion to the United States, that in 1922 Congress enacted the Railroad Right-of-Way Abandonment Act (codified at 43 U.S.C. 912). Section 912 provides that upon abandonment of Federally-granted rights-of-way, the reversionary interest in the United States would immediately vest in the person or entity owning the land traversed by the railroad line, except when the right-of-way was within a municipality, the reversionary interest would then be vested in that municipality. Thirty-five years later, in 1957, a Supreme Court decision would raise the issue of whether Section 912 could be applied to any type of United States right-of-way grant.

Great Northern Railway Company v. United States, 315 U.S. 262 (1942) overruled the Stringham case in respect to post-1871 right-of-way, and in particular the Right-of-Way Act of 1875. This case originated when the railroad attempted to drill for oil and gas on right-of-way obtained pursuant to the 1875 Act. The unanimous Court held that the grant was an easement only and did not include any right to underlying minerals. The Court noted that the 1875 Act was the result of a "sharp change" in Congressional policy, and it found it "improbable that Congress intended by it to grant more than a right of passage, let alone mineral riches" (at p. 275).

After Great Northern, the type of estates in the 1850-1871 rights-of-way could still be considered defined by Townsend as limited fees with reversion to the Federal government and subject to the Railroad Abandonment Act of 1922. See, for example, United States v. Illinois Central R. Co., 89 F. Supp. 17 (E.D., Ill., 1949), aff'd., 187 F.2d 374 (1951), (Sept. 20, 1850, Act Right-of-Way) which found that the oil and gas rights belonged to the railroad. The Court relied on Townsend in so ruling.

The next important right-of-way case is United States v. Union Pacific, 353 U.S. 112 (1957). The Supreme Court followed the rationale of the Court in Kern River v. United States, 257 U.S. 147 (1921), rather than Townsend, and focused on the purpose of the grant (i.e., "railroad purposes") and not the duration of the estate (i.e., "limited fee"). Union Pacific is discussed in a recent publication of the American Bar Association[2] as follows:

> In Union Pacific, the United States brought action to enjoin the Union Pacific Railroad Company for drilling of oil and gas on the right of way granted to it under section 2 of the Union Pacific Act of 1862. In an opinion by Justice Douglas, the Supreme Court held that the "mineral lands" exception found at section 3 of the Act (which addressed lands granted in aid of railroad construction) applied to section 2 (which addressed the railroad right of way), so that the exception found at section 3 of the Act was *implied* in section 2, resulting in an exception of "minerals" in the section 2 of the right-of-way grant. Therefore, the Court held, the interest obtained by the railroad was not a fee simple interest, nor a "limited fee" interest, but a mere easement.
>
> (Emphasis in original, footnote omitted)

All of the land grant rights-of-way created by Congress between 1862-1871 have similar mineral reservations, as was discussed in Union Pacific. But the mineral rights reservation was not the only reason for the Union Pacific Court and other Courts to do away with the "limited fee" concept.

> For the purposes of this case, we are not impressed with labels applied to the title of railroads in their rights-of-way across the public lands of the United States. The concept of "limited fee" was no doubt applied in

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[2] Thomas E. Root, Railroad Land Grants from Canals to Transcontinentals, Section of Natural Resources Law - American Bar Association, Chicago, Ill., 1987.

> Townsend because under the common law an easement was an incorporeal hereditament which did not give an exclusive right of possession. With the expansion of the meaning of easements to include, so far as railroads are concerned, a right in perpetuity to exclusive use and possession, the need for the "limited fee" label disappeared.
>
> (Footnote omitted) State of Wyoming v. Udall, 379 F.2d 635, 640 (10th Cir., 1967).

The easement ruling in Union Pacific was followed in finding that coal slurry pipeline could cross the servient estate (not owned by the railroad) beneath the 1862 Act Union Pacific Railroad right-of-way easement. Energy Transp. Systems, Inc. v. U. Pac. R. Co., (even number section, "that it granted only an easement for the right-of-way cannot be gainsaid"), 435 F. Supp. 313, 317 (D.C. Wyoming, 1977); Energy Transp. Systems. v. Union Pac. R. R. Co. (odd number section, the Union Pacific railroad ". . . by way of its right-of-way easement and within that easement . . ."), 456 F. Supp. 154, 168 (D.C. Kansas, 1978) both aff'd. at 606 F.2d 934 (10th Cir., 1979).

Does the Union Pacific ruling apply to the 1850-1862 right-of-way? Professor Robert W. Swenson in "Railroad Land Grants: A Chapter in Public Land Law," 5 Utah Law Review, 456, 461 (1958), explains that United States v. Union Pacific, supra, was based not only on the mineral exception under Section 3 of the Act, but also upon the construction and meaning to be given the phrase "the right of way" and that the right-of-way was granted expressly "for the construction of said railroad and telegraph line."

Swenson further notes that if the Union Pacific ". . . interpretation of the statute is observed in constructing other grants, decisions such as the Illinois Central case would seem to be incorrectly decided." There does not appear to be any case that answers this question. Perhaps it is because railroad companies who own 1850-1862 right-of-way prefer to "let sleeping dogs lie." See, Burke v. Gulf, Mobile and Ohio Railroad Co., 324 F. Supp. 125, 1129 (S.D. Alabama, 1971).

III. Conclusions

1. The United States does not retain a reversionary interest in post-1871 right-of-way grants. Because the United States does not have a reversionary interest in such easement right-of-way, the Railroad Right-of-Way Act of 1922 cannot now apply to such rights-of-way when they are abandoned. In regard to post-1871 right-of-way, any proposed Congressional bill that purports to retain such Federal right, title, interest, or estate, as would not be subject to 43 U.S.C. § 912 would be totally ineffective. City of Aberdeen v. Chicago & North Transp., 620 F. Supp. 589, 593 (D., So. Dak., D., 1984).

When a railroad easement is abandoned, it expires by its own limitation. When the railroad's interest is merely an easement, upon abandonment it is appropriate to speak in terms of the burden of the dominant estate (the railroad easement) being lifted from the servient estate (the underlying fee). Schnabel v. County of DuPage, 101 Ill. App.3d, 553, 559; 428 N.E. 671 (Ill. App. Ct., 1981); *Brown v. Weare*, 348 Mo. 135, 152 S.W.2d 649 (Sup. Ct., Mo., 1941); *See*, *also*, "Railroad Right of Way: The Real Property Interest in Kansas," 25 *Washburn Law Journal* 327, 342 (1981).

2. The same analysis as given to post 1871 right-of-way is applicable to 1862-1871 right-of-way grants by reason of *Union Pacific* and the *Energy Transp. System* cases.

3. The analysis applied to post-1871 and to 1862-1871 right-of-way could very well be applied to 1850-1862 right-of-way. It is likely that future litigation on 1850-1862 right-of-way will result in a finding that they are also easements with no reversionary interest to the United States.

4. From a constitutional standpoint, the fee title of a patentee of the United States to all of the rights-of-way described above vests at the time of the patent from the United States, not at the time of abandonment of the easement. Therefore, an attempt by the United States to recapture that fee title requires that just compensation be paid under the Fifth Amendment to the Constitution.

Thomas F. McFarland Jr.

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February 26, 1988

Senator **Metzenbaum**. Mr. Richard Krause, Assistant Counsel of the American Farm Bureau Federation.

We are happy to have you with us, sir.

STATEMENT OF RICHARD L. KRAUSE, ASSISTANT COUNSEL, AMERICAN FARM BUREAU FEDERATION, PARK RIDGE, IL

Mr. **Krause**. Thank you, Mr. Chairman. I am happy to be here.

As Mr. Chairman said, my name is Richard Krause. I am Assistant Counsel with the American Farm Bureau Federation in Park Ridge, IL. We do appreciate the opportunity to present our views on S. 1544, which is the National Trails System Improvement Act.

One of the primary interests of the Farm Bureau is the protection of the private property rights of farmers and ranchers, many of whom own property rights abutting railroad rights-of-way. The National Trails System Act and its proposed amendments adversely impact these property rights.

While we do not oppose the development of recreational trails, per se, we do have some very serious concerns about the lengths to which the acts in general, and S. 1544 in particular, disregard these private property rights in order to preserve trail corridors. Section 3 of the bill is of most concern to us. It would provide that the reversionary interest to railroad rights-of-way through public lands described in 43 U.S.C. 912 would remain in the United States and provide a scheme for their disposition.

Section 43 U.S.C. 912, enacted in 1922, expressly granted any present and future rights that the United States might have had in those rights-of-way to land owners or municipalities whose property abuts them. Now, for purposes of this statement, we are not taking a position one way or the other as to whether these rights of the United States were granted by the 1922 act or by patent. In either event, there is nothing left for the United States to retain.

All right, title, interest and estate of the United States in these rights-of-way described in 43 U.S.C. 912 have already been fully conveyed to abutting property owners, either by the patent or by the 1922 act, and there is thus no further interest of the United States that can be retained or otherwise disposed of as provided in section 3 of the bill. The United States cannot dispose of property that it no longer owns.

If, however, the intent of the bill is to reclaim these property rights from land owners, the fifth amendment to the Constitution requires that these land owners be compensated. The fifth amendment prohibits the taking of private property for public use without just compensation. Both the nature of the interest sought to be reclaimed and the expressed public use application of the right-of-way makes the fifth amendment squarely applicable to section 3 of this bill.

The Supreme Court has variously construed the rights granted by Congress to the railroads, and by implication, the rights that are retained by the grantor. Some cases hold that the railroads acquired nothing more than an easement across public lands with the right of reversion to the owner of the underlying property. In most cases, since these lands have already been patented, the lawful owners are private parties. The reversion automatically vests and the right of possession is in the owner when the land ceases to be used for the railroad purposes.

As Mr. Welsh mentioned, these have been specifically applied in railroad rights-of-way since 1871.

Earlier decisions had construed pre-1871 grants as being what they called determinable fees under which the railroad has the property so long as it is used for railroad purposes. Upon cessation of that use, the property reverts to the person who had made the grant, or to anyone to whom he has transferred his interest. This retained right on the conveyance of a defeasible fee is called the possibility of a reverter. The legislative history of the 1922 act and at least one court decision indicate that this interpretation of the railroad interest was the rationale for Congress' enactment of the 1922 act through which they finally disposed of all these interests.

It might be mentioned that just prior to the 1922 act, there were two Supreme Court cases which specifically held that the rights-of-way were defeasible fees with an implied right of reverter.

Regardless of whether the retained interest is a reversion or a possibility of reverter, both interests easily fit within the broadly defined private property, rights that are protected by the fifth amendment. While neither a revision or a possiblity of reverter are a right to present possession, both are considered present, valid property rights. They both have present value.

In most states, both can be freely bought and sold. Also, in most states, both are capable of being inherited and of being conveyed by will.

The present interest of the United States in these rights-of-way was expressly conveyed by the 1922 act. Since 1922, many of these interests have passed from party to party by one or more of these means, even though the owner of this right does not have the current right to possession of the subject property. These are incidents of ownership of property rights which the Supreme Court has repeatedly held to be protected by the fifth amendment's taking clause.

The confiscatory nature of current and proposed amendments to the National Trails System Act, in derogation of the rights of private land owners, has been at least tacitly recognized by the United States Justice Department. The American Farm Bureau is participating in a case currently pending in Missouri challenging a similar provision of the act relating to private easements, with one of the grounds being that the section at issue violates the fifth amendment.

The United States is participating in the case as an intervenor-defendant, and has significantly chosen not to contest our fifth amendment taking claims.

Mr. Chairman, simply stated, this bill goes too far. We therefore oppose enactment of S. 1544. We do not think that non-passage of this bill would have any adverse impact on prudent trail development because State and local governments as well as private entities are still able to negotiate trail rights from the present legal owners of the reversionary interests of this property.

Mr. Chairman, we thank you for the opportunity to present our views on the bill.

[The prepared statement of Mr. Krause follows:]

STATEMENT OF THE AMERICAN FARM BUREAU FEDERATION TO THE SENATE ENERGY AND NATURAL RESOURCES COMMITTEE SUBCOMMITTEE ON PUBLIC LANDS

March 3, 1988

Presented by
Richard L. Krause

My name is Richard L. Krause, Assistant Counsel of the American Farm Bureau Federation. We appreciate the opportunity this afternoon to present our views on S. 1544, the "National Trails System Improvement Act of 1987."

One of the primary interests of Farm Bureau is the protection of the private property rights of farmers and ranchers, many of whom own property abutting railroad rights-of-way. The National Trails System Act and its proposed amendments adversely impact these property rights. While we do not oppose the development of recreational trails per se, we do have very serious concerns about the lengths to which the Act and S. 1544 disregard these private property rights in order to preserve trail corridors.

Section 3 of the bill is of most concern to us. It would provide that the reversionary interests to railroad rights-of-way through public lands described in 43 U.S.C. 912 would remain in the United States, and provides a scheme for their disposition. Section 43 U.S.C. 912, enacted in 1922, expressly granted any present and future rights that the United States might have had in those rights-of-way to landowners or municipalities whose property abuts them.

Section 3 of the bill therefore has no meaning or effect. All "right, title interest, and estate of the United States" in the rights-of-way described in 43 U.S.C. 912 have already been fully conveyed to abutting property owners by the 1922 Act, and there is thus no further interest of the United States that can be retained or otherwise disposed of as provided in section 3. The United States cannot dispose of property that it no longer owns.

If, however, the intent of the bill is to reclaim these previously conveyed property interests from the abutting landowners, the Fifth Amendment to the Constitution of the United States requires that these landowners be compensated.

The Fifth Amendment prohibits the taking of private property for public use without just compensation. Both the nature of the interest sought to be reclaimed and the express "public use" application of the rights-of-way makes the Fifth Amendment squarely applicable to section 3 of the bill.

The Supreme Court has variously construed the rights granted by Congress to the railroads, and by implication the corresponding interests that were retained. Some cases hold that railroads acquired nothing more than an easement across public lands, with a right of reversion to the owner of the underlying property. In most cases, since these lands have been patented, the lawful owners are private parties. The reversion automatically vests the right of possession in the owner when the land ceases to be used for railroad purposes. This construction has been specifically applied to rights-of-way granted after 1871.

Earlier decisions had construed pre-1871 grants as being "determinable fees," under which the railroad has the property so long as it is used for railroad purposes. Upon cessation of such use, the property reverts to the person making the grant or to anyone to whom he has transferred his interest.

This retained right is called a "possibility of reverter." The legislative history of the 1922 Act and at least one court decision indicate that this interpretation of the railroad interest furnished the rationale for Congress to finally dispose of these interests once and for all through the 1922 Act.

Regardless of whether the retained interest is a "reversion" or a "possibility of reverter," both interests easily fit within the broadly-defined "private property rights" protected by the Fifth Amendment. While neither a reversion nor a possibility of reverter are a right to present possession, both are considered present, valid, vested property rights. They both have present value. In most states, both can be freely bought and sold. Also in most states, both are capable of inheritance and conveyance by will. The present interest of the United States was expressly conveyed by the 1922 Act. Since 1922 many of these interests have passed from party to party by one or more of these means, even though the owner of this right does not have the right to current possession of the subject property. These are "incidents of ownership" of property rights which the Supreme Court has repeatedly held to be protected by the Fifth Amendment.

The confiscatory nature of current and proposed amendments to the National Trails System Act in derogation of the rights of private landowners has been at least tacitly recognized by the U.S. Justice Department. AFBF is participating in a case currently pending in Missouri challenging a similar provision of the Act (16 U.S.C 1247d) relating to private easements, with one of the grounds being that the section at issue violates the Fifth Amendment. Participating as an intervenor-defendant, the Justice Department has significantly chosen not to contest our Fifth Amendment taking claims.

Simply stated the bill goes too far. We therefore oppose enactment of S. 1544. There should be no adverse impact on prudent trail development, because state and local governments, as well as private entities, could still negotiate such trail rights from the present legal owners of the reversionary interests of the land.

We appreciate the opportunity to offer our views on S. 1544.

Senator **Metzenbaum**. Thank you very much.

There seems to be some question, Mr. Krause, as to what is the fact as to who owns the land at the moment. The 1922 law, which we are amending, provides on its face that the Federal interests will not transfer or vest in adjacent property owners or municipalities until rail use has ceased, correct?

Mr. **Krause**. That is what the bill says, Your Honor, or that is what the law says. That is what the section says.

Senator **Metzenbaum**. That is what the act of 1922 says.

Mr. **Krause**. That is correct.

Senator **Metzenbaum**. All right. That means to me that the United States retains its interest until abandoned.

Mr. **Krause**. No, Mr. Chairman, I beg to disagree with you on that, and in order to explain the reason I disagree, I think we ought to look back to the situation that existed in 1922. In the first place, as I mentioned, there were a couple of Supreme Court decisions that had recently come down stating that the railroad interest is a defeasible fee with an implied right of reverter, and that implied right of reverter is a legally recognized, valid property interest which becomes possessory upon defeasance of the fee.

Well, I will get into that. In any event, those two Supreme Court cases, one of which has been overruled, by the way, and the other one which has been largely eroded, but in any event, the situation facing Congress in 1922, they thought that they owned the possibility or the right of reverter to these railroad interests as defined by the Supreme Court.

Now, these rights of reverter are present property rights. As I mentioned in my testimony, they are capable of being bought and sold, capable of being inherited, capable of being conveyed by will.

Senator **Metzenbaum**. Well, you say that, sir. Where do you get that authority to make that statement?

Mr. **Krause**. Mr. Chairman, rights of reverter are created by the use of the future tense, and if I might, I do have a book here on property rights, on defeasible fee, and this is Cornelius Moynihan's book "Introduction to the Law of Real Property." In here he cites an example of the grant and the reservation of a possibility of reverter, to have and to hold to B and his heirs so long as the land is used for residential purposes, and when the land is no longer so used, it shall revert to A and his heirs.

Now, Moynihan says that A and his heirs have a present property right to take possession upon the occurrence of that condition.

Senator **Metzenbaum**. That is a different thing than what we are talking about here.

Mr. **Krause**. No, it is not, Mr. Chairman. It is not a different thing because this is what Congress thought they had. This is what Congress thought that the United States had in 1922 as determined by the Supreme Court.

Senator **Metzenbaum**. Well, I think, Mr. Krause, I would take strong exception to what you are saying because the Congressional Research Service, which is an arm of the Library of Congress, comes up with a conclusion that the draft bill prospectively makes a different disposition of the Federal interest, retaining title to abandoned or forfeited rights-of-way in the Federal Government in order to facilitate their subsequent use as part of the National Trails System.

The bill does not affect existing vested titles, and there can be no doubt that the Federal Government can make whatever disposition of its own property it chooses. And then it goes on.

Mr. **Krause**. You are right, Mr. Chairman. I think what the Congressional Research Service is doing is they are confusing current, present, vested rights of possession with property interests. And nowhere is this area more confused, for example, than in the area of future interests. Future interests, by definition, do not vest possession until some later time. However, they are still recognized as present, valid property rights.

And I think Mr. Chairman, I think it is also important to recognize, too, that the statute, the 1922 statute, I think it would give credit to the Congress back in 1922 to interpret that as being a present conveyance of United States interests. The fact that the conveyance is done, expressly reserves mineral rights, number one, in the law; number two, provides that the conveyance or provides that title is going to vest automatically without anything else having to be done, no other deeds or anything else to come, suggests to met that Congress intended to fully convey those rights as of 1922, with possession to take place and with full title to vest at the time they became possessory, whenever the railroad stopped using them for railroad interests.

Senator **Metzenbaum**. I would say that the Solicitor for the Department of Parks and the Interior Department I think come to a different conclusion, although they suggest some changes.

Mr. **Krause**. I have not seen that, Mr. Chairman.

Senator **Metzenbaum**. Well, they have not come up with the language, yes.

Second, certainly Congress can change its mind about disposition until such time as the conveyance occurs.

Third, Mr. Welsh's lawyer says the bill means nothing at all, it is a nullity, so you do not have to worry about it.

Fourth, I think that Congress has to do that which it thinks it has a legal right to do, and then if somebody wants to challenge it in court, the wonderful system of laws that we have in our country make that possible. But I think we ought to do that which we think is right.

Mr. **Krause**. Mr. Chairman, as we are learning in this *Missouri* case, you are correct that Congress can do that which they think in those situations. However, the fifth amendment allows them to do that; although I think in this case the fifth amendment would require that compensation be paid, and if compensation is not paid, then it violates the Constitution.

Senator **Metzenbaum**. Well, it sounds like an interesting legal matter. I do not think I will handle the case; maybe you will.

With that, our hearing stands adjourned.

[Whereupon, at 3:37 p.m., the hearing adjourned.]

APPENDIX

ADDITIONAL MATERIAL SUBMITTED FOR THE RECORD

SOCIETY FOR AMERICAN ARCHAEOLOGY

Statement before the
Subcommittee on Public Lands, National Parks and Forests
Senate Committee on Energy and Natural Resources
Hearing on Fiscal 1989 Budget for the Department of Interior

March 3, 1988

Mr. Chairman, the Society for American Archaeology is pleased to have the opportunity to present this testimony. The continued interest and support of your Subcommittee is a major stimulus for archaeological resource protection, research and interpretation throughout the United States.

The Society for American Archaeology (SAA) is an international scholarly and professional association comprised of both professional and avocational archaeologists concerned about the discovery, interpretation and protection of the archaeological heritage of America. As such, the SAA has had a long partnership with the Department of the Interior and other federal land managing agencies to help preserve and promote the nation's cultural and natural resources.

This year the SAA has several specific funding requests to bring to your attention.

NATIONAL PARK SERVICE

Operations of the National Park System

Proposed Reductions of Base Funding:

The Society is greatly concerned about the Administration's proposed reduction in the Park Operations budget. The requested cut of $52.2 million in federal funding, to be supplemented by fee collections, seems to contradict the intention of the enabling legislation.

Indeed, as we understand it, the intent of the park fee legislation was not to substitute federal appropriations, but rather to supplement them. Activities which had not fully benefitted from direct federal appropriations were to receive

The resources that need this funding are fragile and irreplaceable. They include, among other things, some of the most significant archaeological sites in the world. To cut funding for work that is so needed for the protection of these sites would be a violation of the public trust that has been placed in the Park Service since it was established in 1916. Such a reduction would also be economically unwise, as future costs to do the work will be much higher.

We hope that you will reject the Administration's short-sighted approach and that you will provide sufficient funding for the ONPS to reflect both Congressional intent and to meet the real resource protection needs for which the original park fee legislation was enacted.

El Malpais National Monument

We urge you to increase the level of funding for the El Malpais National Monument, an area that contains outstanding archaeological resources reflecting much of the long and intriguing cultural history of the Southwestern United States. The Administration requested $100,000 for park operations for the monument. The Society supports increasing this to $250,000.

Associated with El Malpais is the Masau Trail. This trail links many of the most important and impressive remains of prehistoric and historic sites in the Southwest including Chaco Culture Historic Park, Pecos and Aztec National Monuments as well as El Malpais. $250,000 is needed to develop the interpretive programs for this trail. In addition, nearby Salinas National Monument is an outstanding example of historic pueblo structures and introduced Spanish conquest structures. Salinas needs $500,000 for ruin stabilization and maintenance.

Anti-looting

As you know, the SAA has made a major initiative to stop the looting and vandalism of archaeological and cultural resources throughout the nation. In this light, we urge you to recommend an addition of not less than $1 million in the ONPS budget for anti-looting efforts in units of the National Park System. This is the same as was earmarked in the fiscal 1988 appropriations.

Looting of archaeological sites is a national problem, one that is destroying our nation's cultural heritage. This outright criminal action is increasing by all accounts. The recent GAO report, "Cultural Resources: Problems Protecting and Preserving Federal Archeological Resources" (1987) highlighted the seriousness of the problem and recommended increases in funding, training and law enforcement. We must all recognize the seriousness of this problem. If something is not done soon there will be no intact archaeological sites left in the United States. Archaeological resources are like endangered species: Once destroyed, they are gone forever.

Looting threatens national park resources as well as those in national forests and public lands. (Looting also destroys resources on private lands, and thought must be given soon on what can be done to prevent this too.) In the case of the NPS and other Federal agencies, there are urgent needs for stronger enforcement of the Archaeological Resources Protection Act (ARPA), for increased staffing and funding for archaeological protection, and for more public awareness and education.

Curation

Last year Congress appropriated $2.73 million to begin a multi-year project for the cataloging and curation of the vast NPS collections. Over 70% of these collections are archaeological in nature and require special care. This year, the Administration requested no funding to continue this program. This is a massive undertaking and requires an enormous amount of work if it is to be done and done well. We urge your Committee to support sufficient funding within the ONPS budget to provide $2.8 million to continue this important program.

National Recreation and Preservation Programs

The SAA deplores the Administration's attempt to cut the funds for the National Register Programs from the $7.8 million appropriated for fiscal 1988 to $7.3 million for fiscal 1989. We urge you to restore the funds for these programs, including funds for the Historic American Buildings Survey (HABS) and Historic American Engineering Survey (HAER).

Departmental Consulting Archeologist

Included in the National Preservation Programs account is the Office of the Departmental Consulting Archeologist (DCA). The DCA is responsible for coordinating the overall federal archaeological program. In this capacity the DCA office needs additional funds to continue its efforts in anti-looting, law enforcement, employee training, and information clearing houses. We request that an additional $100,000 be appropriated and earmarked specifically for the DCA office for these activities, the same amount that you added for fiscal 1988.

Historic Preservation Fund

The SAA supports the efforts and requested amount of $150 million for the Historic Preservation Fund made by the National Conference of State Historic Preservation Officers. This is the sum annually authorized by the National Historic Preservation Act. Considering the preservation needs facing the United States today, it is a reasonable amount to request.

For archaeology, the Historic Preservation Fund's matching grants to the States serve two major functions: (1) to assist with surveys, investigations, analyses and interpretation of archaeological sites and their resources; and (2) to support state activities in the review process which protects sites from federally funded undertakings pursuant to Section 106 of the National Historic Preservation Act. Among other things, the State share of the Fund is also used to nominate archaeological sites to the National Register of Historic Places.

A recent "needs assessment" by the National Conference of SHPO's shows how States regard archaeological resources as important to their history. Many States highlighted archaeologically related projects. The need is great. Unlike historic buildings which may get tax credits or gain economic value from private investment, archaeological resources do not benefit from market-oriented approaches. Archaeology, by the nature of its subject matter, depends a great deal on government support. The State-funded programs are essential to assuring that archaeological and other historic preservation activities are carried out as Congress intended.

Land and Water Conservation Fund

The Land and Water Conservation Fund (LWCF) provides an important tool for national, state and local land acquisition, planning, and development of parks and recreational areas. The SAA urges your Subcommittee to recommend, as you have in the past, substantial increases in both the State and Federal sides of the LWCF.

State and Local LWCF Programs:

Of the total amount we are requesting for the LWCF, an estimated $200 million is needed for the state matching grants. Many archaeological and historical resources have benefited from the State side of the LWCF. Sites ranging from Indian burial grounds, pre-Revolutionary War forts, industrial period sites, Civilian Conservation Corps buildings and others have been incorporated into parks and recreation areas.

The State side of the LWCF is important to preserving and protecting both natural and cultural sites. Studies have shown that there are $340 million in grant applications currently pending and a needs estimate for the next three years of $1.9 billion. Therefore, $200 million is a reasonable, usable amount.

Federal Side, National Park Service:

The Federal side of the LWCF has also benefited archaeological and historical resources through the acquisition of lands and structures in new and expanded units of the National Park System.

The Cuyahoga Valley National Recreation Area in Ohio, for example, contains over 25% of the archaeological resources in the entire midwest region of the National Park Service. Similarly, significant archaeological sites have been acquired at other new areas, including the Santa Monica Mountains National Recreation Area in California.

In the Administration's budget, federal funds for the LWCF Fund are proposed to be cut drastically below the needed level. The Society supports the requests made by the National Parks and Conservation Association and the Wilderness Society for $675 million for the Federal side of the Land and Water Conservation Fund, of which over $190 million would be earmarked for the NPS acquisition program. Among the projects, the SAA would encourage the earmarking of about $5 million for the acquisition of inholdings within the newly authorized El Malpais National Monument in New Mexico.

THE FISH AND WILDLIFE SERVICE

The SAA requests that this Committee secure add-on funding for the Fish and Wildlife Service (FWS) to begin an agency-wide effort to document and protect archaeological resources. The Society recommends that $600,000 be appropriated for use by the FWS in fiscal 1989 for these purposes. This funding should be placed in the Refuge Operations Activity section and should be earmarked for necessary work that is not funded by the FWS for compliance with section 106 of the National Historic Preservation Act or for special appropriated projects such as the archaeological work that is underway at Stillwater National Wildlife Refuge in Nevada.

Refuge Programs:

FWS has jurisdiction over approximately 90 million acres of land, constituting one of the largest, protected administrative systems of land and water in the United States. Many of these lands have been acquired or designed by the federal government in an effort to protect valuable wildlife habitat, wetlands, and other resources for public use and scientific study. In addition to protecting our wildlife, however, it is important to note that this system contains thousands of archaeological sites that provide evidence of past human adaptation to the natural environment. Funding for completion of basic surveys and archaeological resource protection work for compliance with federal historic preservation requirements has been and continues to be lacking.

The FWS does not have a separate fund for the inventory and protection of archaeological and historic sites on its lands. Archaeological inventories are funded largely through individual agency undertakings as part of project costs. This results in an inefficient, piece-meal approach to managing the agency's archaeological sites. The most recent statistics compiled by the Secretary of the Interior through the end of fiscal 1986 indicate that the FWS has completed inventories on less than 1% of its lands, a smaller percentage than other land managing agencies.

Without sufficient documentation, it is difficult to reach an accurate assessment of the condition of archaeological sites managed by the FWS. As your Subcommittee knows, recent trends suggest that this country's archaeological record is being destroyed at an increasing rate. At recent hearings conducted in Colorado by the House of Representative's Committee on Interior and Insular Affairs, the Service estimated that between 30% to 50% of its archaeological sites located in the southwestern United States had been partially looted or destroyed. The Society for American Archaeology feels that this destruction and deterioration is part of a larger national trend that deserves the immediate attention of the Congress and the Service.

Stillwater National Wildlife Refuge:

The Stillwater National Wildlife Refuge is in need of an add-on of $250,000, earmarked specifically to continue the salvage archaeology of human skeletons begun in response to massive and unexpected erosion in 1987. The human skeletal remains have been exposed to natural elements, as well as looters and vandals, due to snow melt erosion. Remains of over 120 individuals have been discovered. These must be professionally excavated, documented and studied prior to reinterment.

BUREAU OF LAND MANAGEMENT

The Bureau of Land Management (BLM) has responsibility for the nation's largest collection of public lands. On these lands are some of the most diverse cultural resources in the country. The SAA opposes the Administration's recommendation to reduce the level of Cultural Resource Management funding by $380,000 from fiscal 1988.

Cultural Resources Management:

The SAA strongly supports restoring the $380,000 and increasing the overall Cultural Resources Management funding by at least $500,000. Restoration to the fiscal 1988 level would enable BLM cultural resource staff to continue base inventory and evaluation. The increase of $500,000 would allow BLM the staffand funds they need to meet the problems documented in the GAO report, "Problems Protecting and Preserving Archeological Resources" (1987). BLM cannot meet the challenges without add on funds earmarked for archaeological site protection, stabilization, site signing, patrols and ranger support.

Resource Protection:

In addition, the SAA strongly supports an add on of $900,000 in the Resource Protection Division for law enforcement for investigation, equipment, informants, cooperative agreements, training, surveillance and travel related to enforcement of the Archaeological Resources Protection Act (ARPA) and other federal statutes. The Administration recommended $3.530 million for the Resource Protection Division. This is the same level as last year. Resource Protection has been functioning at the same level of funding for several years, yet has been faced with increasing responsibilities and duties without additional funding. The Resource Protection division is responsible for investigation and prosecution of all federal laws including ARPA. In 1987, the division investigated 43 counts under Antiquities Theft and Destruction. It is estimated that they will address 59 by the end of 1988 and 66 in 1989.

THE OFFICE OF SURFACE MINING

Mr. Chairman, this is one case where we are not asking for any additional funding. We urge the Committee to look at the way the Office of Surface Mining Reclamation and Enforcement (OSM) manages their requirements under section 106 of the National Historic Preservation Act. Currently, the SAA has joined, in an "amicus" capacity, litigation brought by several other national organizations including the National Trust for Historic Preservation and the Society of Professional Archaeologists (SOPA) against OSM. The suit challenges the regulations developed by OSM for the consideration of archaeological resources during surface coal mining and OSM's overall failure to comply with federal preservation laws. We urge you to look into this manner, and would be happy to supply any further information you might need on it.

THE FOREST SERVICE

The Society is greatly concerned about the Administration's proposed reduction in the Recreation Management Program line item for Cultural Resource Management. The Agency identified a need for $18.7 million for cultural resource projects. The Administration cut that to $12.2 million. This is below the fiscal 1988 level.

Cultural Resources Management, Project Related Work

The Forest Service identified a minimum of $15 million needed for project-related work including timbers sales, road construction, land exchanges, and watershed projects just to keep in compliance with the National Historic Preservation Act. The SAA supports this amount.

Forest Service Special Initiatives

In addition, the SAA recommends the Subcommittee provide $3 million for special initiatives in program management activities including survey of areas of high cultural resource potential that were not scheduled for development (wilderness areas, etc.), inspection and monitoring of important properties to determine condition and need for protection, interpretation of selected properties for the education and benefit of the visitors, stabilization of selected properties threatened with imminent collapse or deterioration, development of management systems and databases to improve control of property records and collections, development of improved management techniques, and the evaluation of some of the backlog of unevaluated cultural properties (now exceeding 80,000 properties Nationwide).

Challenge Agreements and Other Innovative Programs

Challenge Agreements offer an innovative approach to cultural resource management. The SAA urges the Subcommittee to ear mark $500,000 in Fiscal 1989 for the Forest Service to pursue these matching grants. The Forest Service used $500,000 in Fiscal 1988 and the result is over $1 million in cultural resource work. Agreements were made with county or city governments, private corporations, private organization including the Boy Scouts of America, local historic preservation organization and groups with special interest in particular projects.

The use of volunteers or hosted program is yet another approach to getting a lot for a little. On the Superior National Forest in Minnesota, experts estimate that for approximately $5,000 last year, the Forest Service received over $40,000 in work equivalent. This is a 1:8 ratio. Most of the participants in the Superior project are volunteers or work study students from the University. Many other forests use senior citizens for similar projects.

There are many exciting projects which could be accomplished for a small federal input. For example, an add-on of less than $40,000 would begin a Native American oral history program to train Native American students to collect oral histories from tribal elders who once lived on what is Superior and Chippewa National Forests. The advantage of this type of program is that it offers training opportunities for minorities, enables the Forest Service to complete required work including revision of Forest plans and treaty rights. It supplements the forest history program in addition.

Washington Office Staffing Needs

The SAA also supports the request for $.2 million for the Washington Office to increase staff by two full time cultural resource persons and to implement new cultural resource management initiatives.

It is vital to the continued protection of the resources under the stewardship of the Forest Service that sufficient staff be available in the Washington Office to provide the needed coordination, training and assistance to the Forest Service staff. At present the Washington Office has a Cultural Resource Management staff of one person to provide these services to the entire Forest Service. A one person staff is seriously limited in the number of new initiatives that can be undertaken. Increasing the Washington Office by two full time staff persons will permit the expansion of the program into areas where work is urgently needed. This is key to the success of most of the other initiatives. A strong Washington Office effort is necessary to be successful in addressing these issues.

Specific report language

In addition to these funds, the Society requests the Committee include specific language encouraging the Forest Service to take a proactive approach to cultural resource management and to address the needs of non-project related cultural resource protection and resource enhancement.

CONCLUSION

The Society for American Archaeology recognizes that there is a large budget deficit and that under current deficit reduction laws additional funding for Federal programs is difficult to achieve. Budgets should be balanced in such a way that the public's interest is protected. The SAA feels strongly that the budget should not be "balanced" to the detriment of our nation's natural and cultural resource programs. We ask the Committee to continue to show concern and support for these vital programs by supporting our requests.

SUMMARY OF AMOUNTS REQUESTED

NATIONAL PARK SERVICE

Operation of the National Park System (ONPS)

- Base Funding, $52.2 million to restore base funding which the Administration proposes be made up by fees.

- El Malpais, $250,000 for park operations,
  $5 million land acquisition
  $250,000 for interpretation and development of the Masau Trail
  $500,000 for stabilization of Salinas National Monument
- Anti-looting, $1 million
- Curation, $2.8 million

National Recreation and Preservation Programs

- National Register Programs
  $345,000 HABS/HAER
  $100,000 Dept Consulting Archaeologist

Historic Preservation Fund

$150 million for State Historic Preservation programs and National Trust for Historic Preservation

Land and Water Conservation Fund

$857 million, with $200 million directed to state funding

FISH AND WILDLIFE SERVICE

Refuges and Wildlife Activity, for Refuge Operations

- Base inventory $600,000
- Stillwater National Wildlife Refuge data recovery $250,000

BUREAU OF LAND MANAGEMENT

Cultural Resource Management

$380,000 restoration
$500,000 add on

Resource Protection $900,000

FOREST SERVICE

Recreation Management Program - Cultural Resource Management

- Cultural Resource Management
  $15 million
- Special Initiatives
  $3 million
- Challenge Agreements
  $.5 million
- Washington Office staffing and initiatives
  $.2 million

S. 1544, THE NATIONAL TRAILS SYSTEM IMPROVEMENTS ACT STATEMENT BY THE NATIONAL RECREATION AND PARK ASSOCIATION

MARCH 3, 1988

The National Recreation and Park Association supports the passage of S. 1544, the National Trails System Improvements Act.

NRPA and its state affiliates are composed of approximately 45,000 individuals, agencies, and organizations who guide, develop, and manage recreation and park services and resources. Many of our members are state and local park and recreation departments who are often instrumental in the conversion of rail-trails, as well as their ongoing management and maintenance.

As far back as 1977, NRPA has consistently recognized the value of, and threats to, abandoned rail corridors. In a 1977 NRPA report on this topic, a former executive director wrote, "With today's skyrocketing land prices, construction, maintenance, and operation costs, the spider web network of railroad rights-of-way is being compromised as they are sold for housing, developments, agriculture, or other non-linear uses. Park, recreation, and conservation interests [have been] quick to recognize the open space, linear recreation use of the abandoned rights-of-way." NRPA does not advocate the abandonment of rail services. However, when and where abandonment is considered and ultimately occurs, we advocate full consideration for recreation and conservation goals. S. 1544 will help reduce the threat of piece-meal loss and preserve more railroad rights-of-way for public recreational purposes.

Due to their linear nature, railroad rights-of-way create excellent recreational corridors. We consider such corridors to be a necessary element of America's natural and recreational resource system. They provide close to home recreational opportunities; they connect, and consolidate management of, fragmented public lands; and they provide parks with buffers to encroaching development.

We support this legislation's requirement that federally granted railroad rights-of-way be returned to the federal government upon their abandonment. What originally belonged to the American public should once again be theirs for recreation use and enjoyment.

We also consider the bill's language allowing state and local governments or organizations to manage rights-of-way for public recreational purposes to be a significant development in federal/state/local partnerships in conservation and recreation. With today's escalating real estate values, local governments and organizations, in particular, are often unable to invest large sums of money in acquiring railroad rights-of-way. They are frequently discouraged by the costs of recreation development, as well as ongoing maintenance and management. The combination can be insurmountable to even a fiscally strong jurisdicition. However, with an opportunity for a transfer of the right-of-way by the federal government, it is much more likely that local government would be willing to absorb other costs.

While there are no federally granted rights-of-way east of the Mississippi, there do exist countless potential rail-trail conversions that are owned in fee simple by the railroads. As I mentioned, local governments and organizations often find it impossible to compete with developers and other large for-profit institutions for an abandoned right-of-way. The Interstate Commerce Commission has compounded this problem by providing only the briefest span of time for public entities to make an offer on an abandonment before the rail carrier can begin selling off portions of the right-of-way. Once a single portion of a right-of-way has been sold, its linear recreational value is seriously impaired.

Additional legislation may be necessary to clarify the intent of Congress on the ICC's responsibilities to public entities. Rail-trail conversions are always complicated and stringent ICC regulations have made them even more so.

NRPA does not endorse the creation of a separate fund to aid general trail development versus some other type of recreation resource. This type of assistance has and should continue to be available from an improved Land and Water Conservation Fund. However, we do support a revolving loan fund as outlined in the legislation to specifically address state, local, and private non-profit efforts to quickly and effectively participate in rail conversion projects. Further, we believe that no less than 75% of the fund should be available annually to non-federal entities for rail-trail activities.

We also suggest that the subcommittee consider including a loan guarantee provision in S. 1544. A guarantee from the Secretary of the Interior would enable state and local governments, or private organizations to successfully procure loans for rail-trail projects that private lending institutions might otherwise consider to be high risks.

Mr. Chairman, the President's Commission on Americans Outdoors has ignited our imaginations with its vision of greenways that would provide "Americans with access to open spaces and wildlands for the widest possible variety of outdoor activities, close to home." Enactment of S. 1544 will help turn this vision into a reality and, at the same time, preserve America's unique network of rail corrdiors for future generations.

GREATER BETHESDA-CHEVY CHASE COALITION

4310 Kentbury Drive
Bethesda, Maryland 20814
301-656-7946

Allied Civic Group
Cabin John Citizens Association
Town of Chevy Chase
Chevy Chase Hills Citizens Association
Chevy Chase Valley Citizens Association
Citizen Coordinating Committee of Friendship Heights
Coquelin Run Citizens Association
East Bethesda Citizens Association
Elm-Oakridge-Lynn Citizens Association
Friendship Heights Village
Hamlet Citizens Association
Hamlet House Condominium
Hamlet Place Owners, Inc.
Kenwood Citizens Association
Kenwood Condominium
Kenwood Forest Condominium Association II
Kenwood House
Village of Martins Additions
Park/Sutton Condominium Association
Residents against Transitway
Rivera Condominium
Rollingwood Citizens Association
Town of Somerset
Springfield Civic Association
Sumner Citizens Association
Westbard Mews Condominium
Westmorland Citizens Association
Westwood Mews

Testimony

For the Public Lands, National Parks and Forests Subcommittee of the Senate Energy and Natural Resources Committee

Subject: S. 1544, Trails Systems Improvement Act

My name is Anthony F. Czajkowski. I live in Bethesda, Maryland. I am writing to you as chair of the Greater Bethesda-Chevy Chase Coalition, composed of 28 citizen association in Montgomery County in the state of Maryland.

My coalition supports S. 1544.

In the past two years our community has been involved in an issue closely associated with the National Trails System Act of 1933. In April, 1986, the CSX Corporation applied to the Interstate Commerce Commission to abandon the Georgetown Subdivision of the B & O Railroad Company. This is a branch line running from Silver Spring, Maryland, through lower Montgomery County to the C & O National Historical Park and then downstream along the canal to Georgetown, D.C. At the time of the filing, the Real Estate Division of CSX appraised the liquidation value of the entire line at $19,534,000 ($6,875,000 in Montgomery County and $12,659,000 in the District of Columbia).

Various groups indicated interest in acquiring the right-of-way after abandonment. The National Park Service, supported by numerous civic, environmental, and recreational groups, was interested in converting the right-of-way into a hiker-biker recreational trail. Montgomery County proposed a light rail rapid transit to connect the two Metrorail stations between Bethesda and Silver Spring. To establish eligibility under the National Trails System Act, the county proposed a hiker-biker trail alongside their proposed light rail transit. Our Coalition has worked to convert the right-of-way for park and trail use exclusively.

Preliminary negotiations between Montgomery County and CSX indicated a CSX asking price vastly in excess of the 1986 appraisal. The Greater Bethesda-Chevy Chase Coalition wrote to the ICC on November 9, 1987, requesting that its decision on abandonment instruct CSX to dispose of the right-of-way for public use only. We also requested that the ICC set reasonable terms for the sale. We noted, finally, that the use of the ROW for mass transit was inconsistent with the National Trails System Act, even with an adjoining hiker-biker trail.

The exorbitant purchase price asked by CSX is influencing public policy in the county. Advocates of mass transit say that only transit could justify the enormous expenditures for land acquisition. The State of Maryland Department of Transportation recently offered $13 million to acquire the right-of-way. If this occurs, the possibility of an exclusive park and trail use would be eliminated.

The acquisition of the greenway as a park would be, as William Penn Mott, Jr., Director of the National Park Service, stated, "a once-in-a-lifetime opportunity." It would establish a 20 mile linear park from Georgetown to Rock Creek Park, in an area desperately in need of more greenspace. This is exactly the sort of recreational area envisioned last year by the President's Commission on the Outdoors. Lower Montgomery County which has 23% of the county population, has only 5% of the county parkland.

S. 1544, by making federal loans available from a revolving fund, could assist in the conversion of this valuable land to trail use.

Based on our two year experience, the Greater Bethesda-Chevy Chase Coalition recommends that you go one step further in S. 1544. We believe that public or private groups seeking to convert an abandoned rail line to recreational trails should be treated in the same way that the ICC treats a private buyer wishing to continue the right of way for transportation use. Private buyers under U.S.C. 10905 can have the ICC establish all disputed conditions of sale and can have the ICC set a price at the appraised value. Conversion for trail use should have the same option.

Financial loans from a revolving fund will enable public bodies to accommodate purchases within normal budget cycles. Provision for sale at a reasonable price will assist in conserving green space and in protecting taxpayers from paying exorbitant purchase prices for the enjoyment of simple recreation.

National Archives

Washington, DC 20408

MAR 17 1988

Honorable Dale Bumpers
Chairman, Subcommittee on Public Lands,
 National Parks and Forests
Committee on Energy and Natural Resources
United States Senate
Washington, DC 20510

Dear Senator Bumpers:

We greatly appreciate the opportunity to submit a statement for the official record that explains the National Archives' concerns about issues raised during hearings held on March 3, 1988, by your subcommittee on H.R. 2652. The primary purpose of H.R. 2652 is to revise the boundaries of the Salem Maritime National Historical Site in the Commonwealth of Massachusetts to obtain St. Joseph's Polish Roman Catholic Society building to be used by the Park Service in connection with the Site. The National Archives has no objection to the expansion of the Salem Historical Site. We have a natural affinity for the marvelous historical programs run by the Park Service and we count ourselves as one of their many supporters. However, during testimony at hearings held last September in the House of Representatives before the Subcommittee on National Parks and Public Lands and echoed in Senator John Kerry's statement introduced for the record at the hearing held by your subcommittee on March 3, 1988, issues were raised concerning the anticipated use of the St. Joseph's Society building which concern us greatly.

In the hearings held in both the House of Representatives and the U.S. Senate on H.R. 2652, the St. Joseph's Society building was described by witnesses as the place that would be used by the Park Service to store and display records from the U.S. Customs Service dating back to the early 1800's. According to testimony, the records were to include not only those reflecting activities at the Salem Customhouse, but also records from five northern Massachusetts ports. These records are currently stored at the Essex Institute, a private institution in Salem, Massachusetts. The National Archives has been making preparations to take these Federal records into our custody and to make them available for research at our Boston Archives Branch. We very much oppose a proposal that would transfer these Customs Service records to the Park Service's custody at the Salem Historical Site.

National Archives and Records Administration

I believe that some historical background detailing how these records came to be located in the Essex Institute may be helpful in clarifying some of our concerns. In 1922, Senator Henry Cabot Lodge of Massachusetts suggested that Federal records of five Massachusetts customhouses (Salem, Beverly, Gloucester, Newburyport, Ipswich, and Marblehead) be transferred from the Treasury Department to the Essex Institute in Salem, Massachusetts. The recommendation for transfer was repeated in 1931. In both 1922 and 1931, the recommendation was referred to the Librarian of Congress who was authorized under Executive Order 1499 to provide executive departments with the "benefit of his views as to the wisdom of preserving such of the papers as he may deem to be of historical interest." The Librarian of Congress approved the proposal in 1922 and 1931 on two conditions: (1) that the Government retain ownership or title to the records; and (2) that the Essex Institute should return the records when a "Hall of Archives" was prepared to receive them. In 1931, 3 years before the establishment of the National Archives, the Department of the Treasury finally agreed to the proposal and transferred the customhouse records to the Essex Institute under the conditions specified by the Librarian of Congress. It is clear, therefore, that the Treasury Department did not relinquish title to the records and that depositing the records at the Essex Institute was intended as a temporary measure and anticipated that the eventual permanent repository would be the National Archives.

In 1936, Congress enacted Public Law No. 620 which authorized transfer of the Salem customhouse property from the Department of the Treasury to the Department of the Interior as an historic site. This statute, and the legislative history, indicate an intent to preserve the building and grounds as an historic landmark. Both the House and Senate reports include a description of the site as well as the proposed plans for the facility. Nowhere in the legislative history is there any indication of an intent for the Customs Service to relinquish any records to the Department of the Interior. On the contrary, the statute expressly provides that the Customs Service was to continue operations on the site. Moreover, the records at issue were no longer in the custody of the Customs Service in 1936 since these historical records had been transferred to the Essex Institute 5 years previously. Therefore, we conclude that the statute which created the Salem historical site did not include the transfer of any customhouse records to the Department of the Interior. Indeed the customhouse records have remained in the physical custody of the Essex Institute since 1931 under the conditions originally specified by the Librarian of Congress.

In February 1986, the Branch Chief of the National Archives' Boston Branch visited the Essex Institute to examine the customhouse records and determine how the records were being stored and preserved. Based on this inspection and reports from others, it appeared that the condition of many of the records was deteriorating. Because of our concern for the records, the National Archives determined that the records should be moved from the Essex Institute to our Boston Branch where appropriate conservation measures could be initiated. Archival staff were also anxious to begin preparing inventories and finding aids to make the records more accessible to the public. Transferring these records to the National Archives' custody would help complete the historical documentation of New England's maritime commerce since the Archives already holds the records of 23 other New England customs districts, including some records from the Salem, Gloucester, and Marblehead customhouses. Additionally, because of litigation arising from Customs Service activities, Federal District court records in the National Archives' custody complement the customhouse records stored at the Essex Institute. Consolidation of all of this documentation at the National Archives' Boston Branch would enhance the research value of all of the parts and thus promote knowledge of New England's rich maritime history.

With these goals in mind, the Archivist of the United States in June 1986 disapproved a request from the Park Service that the records stored at the Essex Institute be transferred to the official custody of the Park Service. The Archivist instead asked for the Park Service's support in transferring the records to the National Archives. Failing any response to that proposal, the National Archives in June 1987 met with officials of the Customs Service and in November of that year officials of both agencies signed legal transfer documents (SF 258) which transferred legal title to the records from the Customs Service to the National Archives.

Transferring title to the customhouse records to the National Archives does not mean that the Park Service may not have any future use of these records. On the contrary once the records are physically transferred to our custody we can begin to preserve the records and ensure their continued existence so that they will be there when the Park Service and the American public want to use them. We are anxious to meet the Park Service's needs at the Salem historical site. The National Archives can provide microfilm copies of the customhouse records, loan significant customhouse records for exhibit at the site, or provide facsimilies of records for exhibit. We want very much to accommodate the Park Service's legitimate needs while at the same time ensuring that the original records are preserved for posterity as was intended by Congress when they established the National Archives in 1934.

We think it is vitally important to recall just what role in the Government's recordkeeping process the Congress intended the National Archives to fulfill. The legislation that established the National Archives in 1934 was the result of a long campaign led by historians, social scientists, journalists, and other observers of the national scene who were seriously concerned about the deteriorating condition and often the irretrievable loss of many of the historical records documenting our national life and culture. The United States was, in fact, the last of the great industrial nations of the world to establish a national archival institution to ensure the preservation of the nation's historical records. The legislative foundation established by the Congress for the National Archives is based firmly upon the idea that there needs to be a single, central archival system to ensure that historically valuable records are identified, properly stored and cared for, described in a manner aimed at promoting their use, and freely made available to all those who wish to study and write about our history. Without a central archival system some or all of these essential tasks fail to be carried out or are given short shrift. Such was the pattern of archival failure in the United States prior to 1934. Even today there exist some State and local jurisdictions in which responsiblity for archival records has been left to operating, program-oriented governmnent agencies whose failure to adequately care for those archival records continues to illustrate the necessity for a single agency specifically charged with responsibility for the preservation of all historically valuable records.

A central archival system does not rule out or even diminish the opportunity for other agencies engaged in historical, museum, or educational programs (such as the Park Service) to use the records maintained by the central respository to support and enrich their own programs. Facsimiles or, under appropriate conditions, original records can be loaned for exhibit purposes. Microfilm copies of records and publications based on the records can be made available upon request. However, only with the continued assurance that all records determined to be permanently valuable will be available from the National Archives can competing uses of the records be balanced. While we are strongly supportive of the National Park Service's mandate to preserve and explain to the public the significance of historical sites, we adamantly believe that the Service's needs can be accommodated without jeopardizing the system that ensures the continued existence of Federal records for use by private historians and researchers, other Government institutions, or any citizen who wishes to discover more about the operations of the United States Government.

If the Congress were to agree to the transfer of the customhouse records sought by the Park Service for the Salem historical site, a precedent could be established which if followed by the Park Service for other historical sites and by other agencies for their own or related records could ultimately eviscerate this nation's archival program. We ask, therefore, that the Congress seriously consider whether the Park Service's desire to have custody of the Salem customhouse records is sufficient cause to endanger this country's hard-won central archival system. We believe it is not.

Thank you for allowing us to express the views of the National Archives and to have those views included in the official Congressional record concerning the Park Service's Salem historical site. If any further hearings are held, we would welcome the opportunity to appear in person to present our position.

Sincerely,

DON W. WILSON
Archivist of the United States

Enclosures

United States Department of the Interior

NATIONAL PARK SERVICE
P.O. BOX 37127
WASHINGTON, D.C. 20013-7127

IN REPLY REFER TO:
H30(418)

JAN 22 1988

Mr. William von Raab
Commissioner of Customs
U.S. Customs Service
1301 Constitution Avenue, NW
Washington, DC 20229

Dear Mr. Raab:

Since 1938 the National Park Service has administered Salem Maritime National Historic Site, nine acres containing historic wharves, residences, and government buildings in Salem, Massachusetts. A prominent feature of this site is Salem's 1819 Custom House.

When the Custom House was transferred to the National Park Service, a historically valuable collection of customs records accompanied it. These records remain at the site and at the Essex Institute in Salem, which holds other customs records reflecting Salem's leading role in maritime commerce. Because the records are in a poor state of organization and preservation, we and the Essex Institute are working to obtain financial support for their professional care. To accomplish this, the question of ownership must first be resolved: there is no evidence that the Customs Service ever formally transferred custody of its records when it relinquished them physically.

We would appreciate receiving a statement from the Customs Service giving the National Park Service official custody of the historic records from the U.S. Custom House at Salem.

If further information is needed, please write Superintendent Cynthia Pollack at the address below or telephone (617)744-4323.

Sincerely,

Stanley T. Albright

ACTING DEPUTY Director

THE COMMISSIONER OF CUSTOMS
WASHINGTON, D.C.

March 20, 1986

Dear Mr. Albright:

On January 22, 1986, you wrote to my office requesting a statement from the Customs Service giving the National Park Service official custody of the historic records from the U.S. Customhouse at Salem. I did not answer immediately because I wanted to have a representative from our office meet with your people at Salem regarding this matter.

This meeting took place on February 18, 1986 in Salem, Massachusetts. It is our understanding that:

a. There are 500 linear feet of documents;
b. These documents are now physically housed at the Essex Institute in Salem;
c. The National Park Service will provide the resources to inventory, prepare and preserve these documents for use by scholars and researchers;
d. The collection would be available to Customs Service Officials at any time and items will be made available to the Commissioner of Customs upon request;
e. The collection, during and after the inventory, will remain physically at the Essex Institute so that the material is available now for research; and,
f. When the Salem Maritime Museum in the reconstructed Salem Customhouse is completed the collection will be then housed there, space permitting.

Based on the above facts, I agree that the collection should be transferred to the custody of the National Park Service, pending the subsequent approval by the National Archives, which has legal responsibility for all Federal records per regulations issued under 44 U.S.C. 2908. Under these regulations, your Agency will have to get formal approval from the National Archives for Customs to officially transfer the collection to your caretakership.

I was pleased to hear that the restoration of the historic Customhouse will be completed by mid-year 1988 and look forward to visiting the historic Customhouse. It is most appropriate that these matters, which I understand have not been fully resolved since 1922, be settled so that our Bicentennial in 1989 can be celebrated for the event it is.

I appreciate the opportunity to have reviewed this matter and the efforts which your Agency have expended. The restoration of the Salem Customhouse as a National Historic site is a fitting tribute to the men and women who have served the Government since 1789.

Please keep me informed of the decision by the National Archives. If I can be of any further service, I am always available for matters that affect Customs history.

Yours faithfully,

William

United States Department of the Interior

NATIONAL PARK SERVICE
P.O. BOX 37127
WASHINGTON, D.C. 20013-7127

IN REPLY REFER TO:

Your
National Park Service
Reminds You. . .

"TAKE PRIDE IN AMERICA"

APR 8 1986

H30(418)

Mr. Frank Burke
Acting Archivist of the United States
National Archives and
   Records Administration
Washington, DC 20408

Dear Mr. Burke:

Since 1938 the National Park Service has administered Salem Maritime National Historic Site, nine acres containing historic wharves, residences, and government buildings in Salem, Massachusetts. A prominent feature of this site is Salem's 1819 Custom House.

When we acquired the Custom House, a historically valuable collection of customs records accompanied it. Other early customs records pertaining to Salem remained with the U.S. Customs Service. These records, occupying 500 linear feet, are housed at the Essex Institute in Salem, where some of the records obtained by the Park Service are also kept. Because the records are in a poor state of organization and preservation, we and the Essex Institute are working to obtain financial support for their professional care. This can better be obtained if the records are all placed under our official custody. The enclosed letter from Commissioner of Customs William von Raab indicates his willingness to transfer the Customs Service records to the Park Service.

We now request National Archives approval for the transfer. If further information is needed, please contact Superintendent Cynthia Pollack of Salem Maritime National Historic Site, 174 Derby Street, Salem, Massachusetts 01970; telephone (617)744-4323.

Sincerely,

William Penn Mott, Jr.
Director

Enclosure

JUN 2 1986

Mr. William Penn Mott, Jr.
Director
National Park Service
PO Box 37127
Washington, DC 20013-7127

Dear Mr. Mott:

We were most interested in your letter of April 8, 1986, requesting approval to transfer to the National Park Service records of customs houses currently housed at the Essex Institute in Salem, Massachusetts. For the reasons given below, the National Archives cannot approve your request, but instead suggests transfer of the records to the National Archives.

The bulk of the records of the Salem, Gloucester, Newburyport and Marblehead customs houses in Essex County were deposited with the Essex Institute in 1931 and 1932. The arrangement for their storage called for their transfer to the National Archives when the construction of that building was completed. It would be most appropriate for these records to be united with related records of Massachusetts customs houses that are part of the Archives of the United States.

Your letter states that the records "are in a poor state of organization and preservation." The National Archives has both the professional staff and conservation facilities to ensure that the records are appropriately arranged and preserved. We also have the legal responsibility and personal commitment for ensuring that historical Federal records, one of our nation's primary cultural resources, will be available for use of future generations of Americans.

We agree that these customs records are primarily of regional interest. If they were transferred to our custody, they would be maintained at the National Archives-Boston Branch. This would facilitate their use by the public and by Federal agencies such as the National Park Service and the Customs Service. In addition, after processing the files, we would be willing to loan specific documents under appropriate terms of agreement.

We would appreciate your support in transferring the customs records at the Essex Institute to the National Archives. If you or your staff have any questions about the matter, please co[redacted]th Y. Rossman, Director, Records Appraisal and Di[redacted]ivision, on 724-1437.

Sincerely,

FRANK G. BU

FRANK G. BURKE
Acting Archivist
of the United States

MAY 11 1987

Mr. William Penn Mott, Jr.
Director, National Park Service
P.O. Box 37127
Washington, DC 20013-7127

Dear Mr. Mott:

A year ago the National Park Service asked the National Archives and Records Administration to approve the transfer to NPS of legal custody of customs records housed at the Essex Institute at Salem, Massachusetts. Since we cannot approve your request, I asked instead for your agency's support in transferring these customs records to the National Archives.

The National Archives is, by law, the official repository for the archivally valuable records of the Federal government. I would appreciate, therefore, your letting me know as soon as possible when these archivally valuable records will be transferred into the custody of the National Archives - Boston Branch.

Sincerely,

FRANK G. BURKE

FRANK G. BURKE
Acting Archivist
of the United States

May 18, 1987

Mr. William von Raab
Commissioner of Customs
U.S. Customs Service
1301 Constitution Ave., NW
Washington, DC 20229

Dear Mr. von Raab:

As you may recall, the National Park Service (NPS) in 1986 asked the National Archives and Records Administration (NARA) to authorize transfer to NPS custody of Bureau of Customs records housed at the Essex Institute in Salem, Massachusetts. We were unable to approve this request, believing it more appropriate for these Federal records to be united with related records of Massachusetts customhouses that are part of the National Archives of the United States. Enclosed for your information is a copy of our letter advising NPS of this decision.

The Salem, Gloucester, Newburyport, and Marblehead customhouse records were deposited with the Essex Institute in 1931 and 1932 before the establishment of the National Archives. The arrangement for their storage with the Institute called for their transfer to the National Archives whenever "the Government may desire to remove all or any portions of them to its own archives." We believe that these customs records should now be transferred into the custody of the National Archives - Boston Branch. Transfer of the records at this time is vital because it will enable us to take steps to conserve the records, which we understand to be in a poor state of organization and preservation.

I have written the Director of the National Park Service to request his cooperation in the transfer of the records (copy enclosed). We would like to meet with the appropriate officials at the Customs Service to discuss the return of these records. Please have someone on your staff contact Kenneth F. Rossman, Director, Records Appraisal and Disposition Division, on 724-1457 to set up such a meeting. Thank you for your cooperation in this matter.

Sincerely,

FRANK G. BURKE

FRANK G. BURKE
Acting Archivist
of the United States